Supreme Court, U.S.
FILED

112

No. D 08-664

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In The
Supreme Court of the United States

MR. DARRELL COMBS, *et al.*,

Petitioners,

v.

HOMER-CENTER SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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Questions Presented

Pennsylvania's homeschooling statute requires parents, at the end of each school year, to submit a portfolio of materials to the school superintendent for a discretionary determination of whether "appropriate education" has occurred. Petitioners are religiously-motivated homeschooling parents who objected to submitting their programs to the superintendent for his discretionary review. Petitioners challenged the statute on the ground that it violated their right to free exercise of religion in conjunction with their right as parents to direct the education of their children. The Third Circuit rejected the notion that the parental right to choose private education was a fundamental right and instead applied rational basis review, saying: "Since [*Employment Division v.*] *Smith*, a majority of the Court has not confirmed the viability of the hybrid-rights theory. Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta."

The questions presented are:

1. Whether the Third Circuit erred by holding that a "hybrid" claim of free exercise plus parental rights should be treated as a non-fundamental right—in conflict with decisions of the Supreme Court of Michigan and the Ninth and Tenth Circuits?

2. Whether the Pennsylvania homeschooling law violates the

traditional rule set forth in *Cantwell v. Connecticut* that the exercise of fundamental rights cannot be conditioned upon a scheme of discretionary approval?

3. Whether Act 169's requirement that Petitioners submit their home education program to the discretionary review of the superintendent, contrary to Petitioners' religious beliefs and subject to criminal prosecution for refusal, imposed a substantial burden under the Free Exercise Clause?

List of Parties

Rev. Darrell and Kathleen Combs

Thomas and Babette Hankin

Douglas and Shari Nelson

Dr. Mark and Dr. Maryalice Newborn

Dr. Thomas and Timari Prevish

Rev. Steve and Meg Weber

Homer-Center School District

Joseph F. Marcoline, in his official capacity as Superintendent of Homer-Center School District

Norwin School District

Richard Watson, in his official capacity as Superintendent of Norwin School District

Franklin Regional School District

Stephen Vak, in his official capacity as Superintendent of Franklin Regional School District

Bristol Township School District

Regina Cesario, in her official capacity as Superintendent of Bristol Township School District

Titusville Area School District

John D. Reagle, in his official capacity as Superintendent of Titusville Area School District

DuBois Area School District

Sharon Kirk, in her official capacity as Superintendent of DuBois Area School District

There are no parent companies or non-wholly owned subsidiaries.

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Jurisdiction

The United States Court of Appeals for the Third Circuit issued its panel decision on August 21, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes

The text of the First and Fourteenth Amendments to the U.S. Constitution are set forth in the Appendix at 271a. The compulsory attendance law of Pennsylvania is found in the Appendix at 273a, and the home education law of Pennsylvania is found in the Appendix at 279a.

Statement of the Case

I. Material Facts.

At the beginning of each school year, the Pennsylvania home education law (Act 169) requires

homeschooling parents to submit an affidavit to the superintendent of their local school district. This affidavit must include the name of the parent/supervisor, name and age of children, address, and telephone number; assurance that subjects are taught in English; an outline of proposed education objectives by subject area; evidence of immunization; receipt of health and medical services required by law; and certification that the supervisor and other adults in the home have not been convicted of certain criminal offenses within the past five years. (24 P.S. § 13-1327.1(b)).

At the end of each school year, Act 169 requires homeschooling parents to submit portfolios of work samples to the superintendent. The statute requires the portfolio to include "samples of any writings, worksheets, workbooks, or creative materials used or developed by the student." (24 P.S. § 13-1327.1(e), (h)). In some cases, hundreds of pages of students' work are submitted to the superintendent. Act 169 requires homeschooling parents to also submit "a log, made contemporaneously with the instruction, which designates by title the reading materials used." (24 P.S. § 13-1327.1(e)(1), (h)).

In addition to the extensive portfolio and log, Act 169 requires homeschooling parents to submit annual written evaluations to the superintendent. These evaluations must be completed by a professional educator hired and paid for by the parents (a certified teacher, a non-public school teacher or administrator, or a licensed clinical or school psychologist) who must determine whether

"appropriate education" has occurred. (24 P.S. § 13-1327.1(e)(2), (h)). This independent review is not binding on the superintendent.

In addition to the extensive portfolio of student work, log, and evaluation, Act 169 requires homeschooling parents to submit standardized test scores to the superintendent at the end of grades three, five, and eight. (24 P.S. § 13-1327.1(e)(1), (h)). The results of the standardized exams are not binding on the superintendent in his discretionary review of the "adequacy" of each child's progress.

In each year, after a qualified evaluator has already reviewed the materials, everything, including the evaluator's report, is submitted to the superintendent, who also reviews the materials to determine whether "appropriate education" has occurred. The Act defines the relevant term: "'Appropriate education' shall mean a program consisting of instruction in the required subjects for the time required in this act and in which the student demonstrates sustained progress in the overall program." (24 P.S. § 13-1327.1(a)). Failure to comply with Act 169's requirements can lead to criminal prosecution for truancy. (24 P.S. § 13-1327).

There is no definition of "sustained progress" in the Act, and there are no statutory restrictions on the exercise of the superintendent's discretion. He could, if he chose, ignore a glowing report from the parent's professional evaluator and top achievement test scores. Instead, he could decide, as the result of his own discretionary review of the student work, that "appropriate education" had not occurred

because "sustained progress" satisfactory to him was not demonstrated.

The six cases in this Petition involve six married couples who have homeschooled their children for many years. They are Darrell and Kathleen Combs, Thomas and Timari Prevish, Mark and Maryalice Newborn, Thomas and Babette Hankin, Douglas and Shari Nelson, and Steven and Meg Weber. All of the Petitioners are Christians, although they are from different denominations, including Catholic and Protestant. App. 8a. All of the Petitioners sincerely believe that Act 169 places a substantial burden on the free exercise of their religion. App. 8a. They believe that God has given them as parents the primary and sole responsibility to direct the education of their children, and that Act 169 is a usurpation by the State of their religious and parental rights and authority in this area. App. 8a. They believe that all education is religious and that religious values must be infused throughout the entire curriculum. App. 8a. Each Petitioner eventually came to an independent conclusion that their religious beliefs about education and the roles of the family and government were incompatible with compliance with Act 169, particularly submitting the portfolio to the superintendent for discretionary review. App. 9a.

For many years, these parents complied with Act 169 and received ongoing approval from this discretionary process.[1] However, on December 9,

---

[1] Thomas and Babette Hankin never complied with Act 169. App. 9a.

2002, Pennsylvania enacted the Religious Freedom Protection Act (RFPA) (71 P.S. §§ 2401 *et seq.*). It states that "Laws and governmental actions which are facially neutral toward religion, as well as laws and governmental actions intended to interfere with religious exercise, may have the effect of substantially burdening the free exercise of religion." (71 P.S. § 2402). After finding out about this new law, the Petitioners separately filed notices with the public school districts in which they live, informing them that Act 169 substantially burdened their free exercise of religion and seeking an exemption under the RFPA. App. 9a. All requests for an RFPA exemption were denied. App. 9a. The public school districts then either threatened or initiated truancy proceedings (App. 9a), and the Petitioners filed suit against the school districts.

II. Proceedings Below

A. District Court

The Petitioners sued the school districts in various state and federal courts seeking declaratory and injunctive relief under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and the RFPA.

The first case of these consolidated cases was filed in state court on behalf of the Combs family on September 23, 2004. The defendant school district exercised its option to remove the matter to the United States District Court for the Western District of Pennsylvania. Eventually, at the suggestion of the District Court and with agreement of the parties, the

other five cases ended up before the same District Court judge. App. 9a-10a.

The cases were consolidated in the District Court for pre-trial and summary judgment purposes. App. 10a. The District Court ordered that "threshold legal issues," such as the proper standard of review for Petitioner's federal constitutional claims, be addressed by summary judgment motion before discovery was completed. App. 10a. Petitioners filed a consolidated summary judgment motion addressing the threshold issues. Petitioners argued, among other things, that the right of religious parents to direct the upbringing of their children's education was a fundamental right. Thus, they contended, strict judicial scrutiny should be applied to Act 169 based on this Court's description of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as a "hybrid situation" in *Employment Division v. Smith*, 494 U.S. 872 (1990). App. 31a. Petitioners contended that *Smith* was a clarification of *Yoder*, arguing that *Yoder* is properly understood as an exception to the *Smith* general free exercise rule when both the Free Exercise Clause and the right of parents to direct the education of their children are intertwined. App. 32a.

The District Court denied Petitioners' "threshold issues" summary judgment motion. App. 182a *et seq.* The District Court's opinion was not based on the presence of disputed facts. Instead, it held in a published opinion that Petitioners could not prevail as a matter of law. The District Court, exercising supplemental jurisdiction, denied Petitioners' claims under the state RFPA. Regarding

the federal free exercise claim, the District Court applied rational basis review rather than strict judicial scrutiny and held that Act 169 satisfied rational review. App. 265a.

Because Respondents had not filed a dispositive motion, the District Court allowed them to file their own motion for summary judgment to bring the case to a close. App. 10a. The Respondents' summary judgment motion was confined to the question of whether "the school districts have 'substantially burdened' the practice of the Plaintiffs' faiths in enforcing Act 169 or, 'as applied.'" App. 10a. Petitioners were allowed to file an opposition brief, which addressed the District Court's first opinion and the "as applied" challenges.

The District court granted Respondents' summary judgment motion and issued a modified opinion, from which Petitioners appealed. Because the District Court held that rational basis review was the correct standard to apply to these free exercise claims, it did not decide issues of compelling governmental interest or least restrictive means. App. 10a-11a.

B. Third Circuit.

Regarding Petitioners' federal free exercise claim, the Third Circuit affirmed the District Court, finding that Pennsylvania's compulsory attendance law was "a neutral law of general applicability." App. 27a. The court found that "[t]he Commonwealth has a legitimate interest in ensuring children taught under home education programs are achieving

minimum educational standards and are demonstrating sustained progress in their educational program" and held that "Act 169 survives rational basis review." App. 29a, 31a.

The Third Circuit next examined what this Court referred to in *Smith* as "hybrid situations." The Third Circuit noted that while it had "discussed the *Smith* hybrid-rights theory in prior opinions, its meaning and application remains an open question in our circuit." App. 32a. The Third Circuit also explained that "*Smith's* hybrid-rights theory has divided our sister circuits. Some characterize the theory as dicta and others use different standards to decide whether a plaintiff has asserted a cognizable hybrid-rights claim." App. 33a. After surveying the other federal circuits and their treatment of this Court's discussion of *Yoder* in *Smith*, the Third Circuit concluded, "Since *Smith*, a majority of the Court has not confirmed the viability of the hybrid-rights theory. Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta." App. 38a.

The Third Circuit then addressed the parents' claim that "the Commonwealth's 'subjective' and 'discretionary' review over the Act 169 disclosures violates their right to control their children's education. They insist any review of the home education programs must be purely 'objective.'" App.42-43a. Even though parents' briefs and arguments brought cases such as *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), to the court's attention as support for their argument

that subjecting the exercise of fundamental rights to a discretionary review process was unconstitutional, the Third Circuit opinion simply fails to mention any case on this point. Rather, the opinion simply rehearses the unchallenged notion that the right to private education is not an unfettered right and may be subjected to appropriate forms of regulation. App. 43-44a.

The opinion suggests that it may be impossible to find a definition of "objective" evaluation. Moreover, it suggests that Petitioners failed to define the term "objective" in our briefs. App. 43a. Finally, the opinion suggests that the evaluation of student work nearly always involves some degree of subjectivity. *Id.*

The Third Circuit acknowledged that "[i]n *Yoder*, the Court granted a religious-based exception to a regulation of general applicability." App. 45a. The Court then essentially held that this Court's holding in *Yoder* applied only to the Amish and that it has no application beyond the facts of *Yoder*.

The Third Circuit declined to exercise supplemental jurisdiction over Petitioners' state-law statutory claim under the RFPA. It vacated the District Court's ruling and instructed the District Court to remand those claims to state court. App. 55a.

C. District Court.

After the mandate issued, the District Court stayed the remand of the state RFPA claims

"pending final disposition of the Plaintiffs' Petition for Certiorari to the United States Supreme Court." App. 76a *et seq*.

Argument

I. The Third Circuit Erred by Treating This Court's "Hybrid Right" Analysis as Dicta.

This Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), has resulted in a major reorientation of the jurisprudence concerning the free exercise of religion. In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006), this Court acknowledged that the *Smith* opinion "rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner*, 374 U.S. 398 (1963)." However, the *Smith* opinion itself seems to take the position that it was not changing the prior free exercise jurisprudence. Indeed the Court said:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.
>
> Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the

> obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).

Id. at 878-879 (Internal quotation marks omitted).

However, a number of this Court's prior decisions had granted religious objectors a constitutional exemption from laws of general applicability in "as applied" challenges. This Court explained these prior cases had not been decided on purely free exercise grounds:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, *see Cantwell v. Connecticut*, 310 U.S. at 304, 310 U. S. 307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573 (1944)

> (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to direct the education of their children, *see Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

Id. at 881.

This Court then rejected the "as applied" claim made in *Smith* on the ground that it did not "present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right." *Id.* at 882.

This petition for certiorari seeks clarification of the hybrid-rights portion of the *Smith* opinion. As we demonstrate below, the federal Courts of Appeal have become hopelessly split on the meaning and the application of this portion of the *Smith* opinion. Moreover, the highest courts of a number of states have also addressed this question and are similarly split on the meaning and the applicability of the hybrids rights discussion in *Smith*.

While there are many variations on this theme, there are two basic approaches that courts have used: (1) the hybrid-rights discussion was dicta and is not binding on lower courts; or (2) the hybrid-rights discussion is a binding re-interpretation of a

number of the Court's precedents, all of which remain good law.

Whether the lower courts recognize it or not, the rejection of the hybrid-rights theory on the grounds that it was dicta results in a tacit reversal of some prior decisions of this Court. In the case at bar, for example, the decision to reject the hybrid-rights theory as dicta results in an implication that *Wisconsin v. Yoder* is no longer binding precedent on cases which present exactly the same type of claim raised in that case—a religious objection by parents to some aspect of the compulsory attendance law. Unlike *Smith*, the case at bar presents a free exercise claim that is clearly connected with parental rights. *Smith* would seem to say that such cases should be adjudicated under the standard set forth in *Yoder*.

It would be one thing if the Third Circuit had applied the standard from *Yoder* in a way that Petitioners found wanting. Such a claim would be a garden-variety petition for certiorari asking this Court to review a mistaken application of the correct legal standard. This case is different. The issue is whether *Yoder* and *Pierce*, as restated in *Smith*, continue to bind lower courts in consideration of similar claims.

The Third Circuit rejected the legal standard from *Yoder* on the grounds that *Smith's* discussion of *Yoder* and the hybrid-rights theory was dicta. The decision under review operates as an open invitation for the lower courts to treat this Court's decisions in cases like *Yoder* as non-binding precedents.

Certiorari is clearly appropriate in this case to clarify the meaning of the hybrid-rights discussion in *Smith*, and to establish once-and-for-all that the free exercise of religion, when combined with another fundamental right, will still be treated as a fundamental right as it was in *Yoder*.

A. Free Exercise Jurisprudence Regarding Hybrid-Rights is Completely Disorganized.

In the 18 years following the *Smith* decision, "What the Court meant by its discussion of 'hybrid situations' in *Smith* has led to a great deal of discussion and disagreement." *Parker v. Hurley*, 514 F.3d 87, 97 (1st Cir. 2008). Some courts have labeled the hybrid theory "dicta" (*Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 464 (N.Y. 2006); *Leebaert v. Harrington*, 332 F.3d 134, 143 (2nd Cir. 2003)) or a "misreading" (*Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 88 (Cal. 2004)), while others complain that "It is difficult to delineate the exact contours of the hybrid-rights theory discussed in *Smith*." *Swanson v. Guthrie*, 135 F.3d 694, 699 (10th Cir. 1998). Several courts have requested guidance from this Court: the Sixth Circuit in *Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993) and *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 240 F.3d 553, 562 (6th Cir. 2001), *rev'd on other grounds*, 536 U.S. 150 (2002); and the Third Circuit in this case: "Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta." App. 38a. The Ninth Circuit in *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692,

703 (9th Cir. 1999), said, "The Supreme Court has been somewhat less than precise with regard to the nature of hybrid-rights."

Because of this Court's ruling in *Smith*, free exercise jurisprudence is muddled. Courts have applied strict scrutiny, rational basis, or some "in-between" tests to determine how far religious freedom is protected when combined with another constitutional claim. Petitioner parents therefore seek certiorari to resolve this confusion.

B. Courts That Have Accepted Some Version of a "Hybrid-rights" Claim: First Circuit, Seventh Circuit, Eighth Circuit, Ninth Circuit, Tenth Circuit.

In the case of *Parker v. Hurley*, 514 F.3d 87, 98 (1st Cir. 2008), the First Circuit stated that it wanted to avoid "entering the fray over the meaning and application of Smith's 'hybrid situations' language...." It noted the confusion in the Circuits over precisely which test should apply in free exercise cases (rational basis, compelling interest, or something in between), but ultimately did not determine "what must be pled to raise a viable hybrid claim, as *Smith* uses the term" since it held that the parents had not established a constitutionally significant burden. *Id.* at 99. Thirteen years earlier, in *Brown v. Hot, Sexy and Safer*, 68 F.3d 525, 534, fn 7 (1st Cir. 1995), the First Circuit recognized that "The Supreme Court has explained that a special situation pertains where a free exercise challenge is brought in conjunction with

a substantive due process challenge involving the right of parents to direct the upbringing of their children." However, the court distinguished the claims of the plaintiffs in *Brown*, who were parents of public school students, from the parents in *Yoder*, who rejected state involvement in their children's high school education. It explained that the parents had not stated "a privacy or substantive due process claim. Their free exercise challenge is thus not conjoined with an *independently protected* constitutional protection." *Id.* at 539 (emphasis added).

The Seventh Circuit ruled against church plaintiffs in *Civil Liberties for Urban Believers v. Chicago*, 342 F.3d 752 (7th Cir. 2003), who brought suit regarding zoning ordinances that had detrimentally affected the churches. However, it appears that the Seventh Circuit would accept a well-pled hybrid claim, because after carefully analyzing the churches' claims of freedom of speech, assembly, and equal protection, all of which the churches claimed should be combined with their free exercise claim, the Court held that "Appellants have identified no constitutionally protected interest upon which the [ordinance] infringes, as they must in order to establish a hybrid-rights claim requiring heightened scrutiny." *Id.* at 765.

In *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 473 (8th Cir. 1991), the Eighth Circuit recognized that a hybrid claim *could* require strict scrutiny. But it has never defined exactly how that claim could be successfully brought.

The Ninth and Tenth Circuits have clearly adopted the hybrid theory in interrelated cases. The Ninth first recognized it in *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) ("*Smith*, however, excepts a hybrid-rights claim from its rational basis test.") The Tenth then cited *Miller* in adopting its own hybrid right test in *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). However, both Circuits require strict scrutiny to be applied only in cases where a "colorable" constitutional claim is combined with a free exercise claim. "We define this to mean that the plaintiff must show a fair probability or likelihood, but not a certitude, of success on the merits." *Id.* at 1297; see also *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004); *Swanson v. Guthrie*, 135 F.3d 694, 699 (10th Cir. 1998) ("[W]e believe that simply raising such a claim is not a talisman that automatically leads to the application of the compelling-interest test.")

The D.C. Circuit has been inconsistent on whether a hybrid claim should be recognized. Although it appeared to recognize such a theory in *E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 467 (C.A.D.C. 1996), a later ruling in *Henderson v. Kennedy*, 253 F.3d 12, 19 (C.A.D.C. 2001), held that plaintiffs would have to prove an independently viable constitutional claim, such as free speech, along with the religious freedom claim in order to prevail.

C. Courts That Have Rejected "Hybrid-rights" Claims: Second Circuit, Third Circuit, Sixth Circuit.

The Second Circuit rejected the concept of a "hybrid right" analysis in *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001): "[T]he language [in *Smith*] relating to hybrid claims is dicta and not binding on this court." The court analyzed the case under rational basis review instead of applying strict scrutiny. Two years later, in *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003), the court explained, "We too can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated."

The Third Circuit had not ruled on the applicability of a hybrid theory until this case. In previous cases, the court had called it "a possible exception," *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, 309 F.3d 144, 163, n. 20 (3d Cir. 2002), but had never relied on it to determine what level of scrutiny to apply to government action. In this case, however, the court ruled, "Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta." App. 38a.

The Sixth Circuit has been the court most adamantly opposed to applying strict scrutiny review under a hybrid-rights analysis. In 1993, the court held, "Such an outcome is completely illogical; therefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause

vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause." *Kissinger*, 5 F.3d at 180. More recently, the court stated, "we reject plaintiffs' assertion that the Supreme Court established in *Employment Division v. Smith* that laws challenged by hybrid-rights claims are subject to strict scrutiny." *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 240 F.3d 553, 561 (6th Cir. 2001), *rev'd on other grounds*, 536 U.S. 150 (2002).

D. State High Courts Are Also in Confusion Regarding *Smith*'s Hybrid-rights Language.

The Supreme Court of Michigan has ruled squarely that a hybrid parental rights/free exercise claim is entitled to strict scrutiny under *Smith* in a case very similar to the case now presented to this Court, but ignored by the Third Circuit's ruling. In *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993), homeschooling parents challenged a state law that required them to obtain teaching certificates before being permitted to teach their children at home as their religious beliefs commanded. The court adopted *Smith*'s reasoning that a free exercise claim in conjunction with a parental right to direct their children's education "demands the application of strict scrutiny." *Id.* at 134. The Supreme Court of Michigan then held that the teaching-certificate requirement failed the strict-scrutiny test. *Id.* at 144.

The Supreme Court of Hawaii, in *State v. Sunderland*, 168 P.3d 526, 534 (2007), recognized that *Smith* "implies [that a hybrid right] would merit a strict scrutiny analysis." However, because the defendant raising the claim had raised only a free exercise claim rather than a hybrid, the court refused to use strict scrutiny.

On the other hand, the Nebraska Supreme Court has rejected the hybrid-rights theory in *Douglas County v. Anaya*, 694 N.W.2d 601, 606 (2005), where parents tried raising a parental right/free exercise claim regarding mandatory immunization. The court ruled, "We conclude that the Anayas' assertion of a hybrid-rights claim does not implicate a strict scrutiny review of § 71-519. A party may not force the government to meet the strict scrutiny standard by merely asserting claims of violations of more than one constitutional right."

The New York Court of Appeals referred to the hybrid passage in *Smith* as "dictum" in rejecting a religious free exercise claim made by faith-based social services in *Catholic Charities of Albany v. Serio*, 859 N.E.2d 459, 464 (2006). The court held that the plaintiffs had raised only an "insubstantial" claim of free speech, and that therefore they were only entitled only to rational basis review of their free exercise claim. *Id.* at 465.

The Supreme Court of California has addressed this issue peripherally in two cases, *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67 (Cal. 2004), and *North Coast Women's Care*, 189 P.3d 959 (Cal. 2008). In *Catholic Charities*,

the court stated, "The high court has not, since the decision in *Smith, supra,* 494 U.S. 872, 110 S. Ct. 1595, determined whether the hybrid-rights theory is valid or invoked it to justify applying strict scrutiny to a free exercise claim." *Id.* at 88. It noted that the Sixth Circuit rejected such a theory as "completely illogical." *Id.* Then, assuming for argument's sake that hybrid-rights did exist, the court found that the plaintiffs had not "alleged a meritorious constitutional claim that might justify the theory's application to this case." *Id.* Likewise, in *North Coast,* the court held that the plaintiffs had failed to raise a conjoined free speech claim, and thus, they were not entitled to strict scrutiny of their religious free exercise claim.

This Court's discussion of "hybrid situations" in *Smith* has generated much litigation heat but little doctrinal light. The Courts of Appeal and State Supreme Courts have repeatedly asked for guidance; this case presents an opportunity to provide such illumination.

The American public has long depended on the interpretation of the Free Exercise Clause found in cases like *Cantwell, Murdock,* and *Yoder.* This Court needs to clearly reaffirm that these cases are still binding precedents and that religious freedom retains some protections after *Smith.* These "hybrid" cases all raised successful as applied challenges to neutral laws of general applicability. It simply cannot be the case that the Free Exercise Clause alone among First Amendment liberties never leads to a viable as applied challenge. This Court needs to affirm these decisions because in the post-*Smith*

confusion they are being disregarded as part of a non-binding hybrid doctrine.

II. Act 169 Violates the Fundamental Right of Parents Both Facially and As Applied.

If, after clarifying the status of the hybrid-rights theory, this Court reaffirms the validity of the free exercise-parental right[2] found in *Pierce v. Society of Sisters* and *Yoder*, the issue then shifts to whether Act 169 violates this fundamental right. Petitioners raise both a facial challenge and an as applied challenge to Act 169. Petitioners contend that Act 169 is unconstitutional on its face because it subjects the exercise of a fundamental right to discretionary review and approval by a government official. Petitioners also contend that they meet the "burden" test for an as applied free exercise challenge because they are compelled to seek discretionary approval of a government official in violation of their religious beliefs, and that they will

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[2] Petitioners suggest that all parents, religious or non-religious, have a fundamental right to direct the education and upbringing of their children. No parent, religious or secular, should have their right to choose a private education subjected to the kind of discretionary process found in Act 169. However, in light of *Troxel v. Granville*, 530 U.S. 57 (2000), where this Court was widely split on the question of whether parental rights should be considered a fundamental right, this is not the claim made by these Petitioners. They have relied instead on the apparent recognition that the blend of parental rights and religious freedom found in *Yoder*, as restated in *Smith*, states a fundamental right. Petitioners filed this litigation in the belief that *Smith* adopts just such a reading of *Yoder*.

be criminally prosecuted for non-compliance. The issue of whether the state has a compelling governmental interest in this particular form of regulation of homeschooling and whether Pennsylvania has chosen the least restrictive means of achieving its interest in education was not decided by either the District Court or the Third Circuit.

A. The Exercise of a Fundamental Right May Not Be Subjected to a Process of Discretionary Review and Approval by Government Agents.

Pierce and *Yoder* state distinct, albeit interrelated, rules about parental and religious liberty. *Pierce* states the general rule that parents have the fundamental right to choose private education as a means of satisfying a state compulsory attendance law.

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce, 268 U.S. at 535.

Yoder holds that parents have the fundamental right to choose an unrecognized path (Amish vocational education) for a portion of a child's education (the last two years of compulsory education) when the chosen path satisfies the state's legitimate interest in education; that is, literacy and self-sufficiency. 406 U.S. at 233-34.

The facial challenge raised by this case contends that the fundamental right of parents to choose private education may not be subjected to a scheme of discretionary approval by the local public school superintendent. The fact that the form of private education is homeschooling rather than an institutional private school is of no consequence since Pennsylvania has recognized the legitimacy of homeschooling as a path to satisfy compulsory attendance.[3] The facial issue raised regarding Act 169 is exactly the same as if Pennsylvania had permitted parents to choose a traditional private school only if the local superintendent thought such schooling was "appropriate" for a particular child and whether the child had demonstrated "sustained progress" without a meaningful and objective definition of either term.

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[3] The predecessor to Act 169 was declared unconstitutionally void for vagueness in *Jeffrey v. O'Donnell*, 702 F. Supp. 516 (M.D. Pa. 1988). The prior act gave local superintendents too much discretion in determining whether homeschooling could begin initially. Act 169 placed the most burdensome homeschool regulatory system in the nation on homeschooling parents, and then reinstated the superintendent's discretion at the end of the first year and each successive year of home instruction.

The Third Circuit did an extensive review of the end-of-the-year review process required by Act 169. App. 16a-22a. The Petitioners repeatedly directed the court's attention to the fact that the statute was written to give the superintendent discretion. However, the court seemed content with the fact that there was no example of abuse of discretion in the record. App. 22a. Moreover, the court opined that the evaluation of a student's schoolwork is often subjective such as in the grading of an essay. App. 43a.

This approach contains two key analytical failures. First, the fact that no Petitioner was ever unsuccessful in seeking discretionary approval does not eradicate the right to complain about this form of governmental discretion over the exercise of a fundamental right. "[I]t is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Freedman v. Maryland,* 380 U.S. 51, 56 (1965). Second, Petitioners admit that when a teacher evaluates student work, subjectivity is inherently involved. Moreover, the philosophy of the educational institution is involved. In the context of these religious homeschoolers, the religious worldview is also inherently involved. But, none of this means that the government has no choice but to employ its own subjective standards and discretion in the evaluation of a private educational institution. Despite the Third Circuit's claim that Petitioners refused to "define" the term "objective," App. 43a,

Petitioners repeatedly gave the court examples of objective standards that other states have employed in the evaluation of homeschooling.

B. The Third Circuit Erred by Ignoring *Cantwell v. Connecticut*'s Holding that Fundamental Rights Cannot Be Contingent Upon Official Discretion.

While objective regulations of private education have been sanctioned by the relevant precedent,[4] this Court has never permitted a state to impose a discretionary scheme of official approval as a necessary condition for the exercise of a fundamental right.

In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), Jehovah's Witnesses refused to seek permission from the local government to conduct public evangelism activities. The statute in question gave the local officials the authority to determine whether a cause was "religious" or a "bona fide object of charity" as well as whether the activity conformed to "reasonable standards of efficiency and integrity." *Id.* at 302. If a person solicited funds for a religious purpose without first obtaining such government review of his cause, he was subject to criminal prosecution. *Id.*

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[4] See, e.g., *Pierce*, 268 U.S. at 534, acknowledging the "power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils..."

Connecticut argued that the official's role in issuing permits was purely ministerial and without discretion. In any event, the state argued, his decision to approve or disapprove the exercise of religious liberty was subject to judicial review if he abused his discretion. But this Court rejected the notion that the role to be played was merely ministerial. Instead, it held that the ordinance gave a local official discretionary-approval authority over the exercise of religious activity. Granting such discretionary authority over religious activity to a government official was unconstitutional. *Id.* at 306. In 2002, this Court restated the constitutional invalidity of the statute in *Cantwell*: [It was] "an ordinance requiring Jehovah's Witnesses to obtain a license before soliciting door to door [that] was invalid because the issuance of the license depended on the exercise of discretion by a city official." *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 162 (2002).

Ever since *Cantwell*, the Supreme Court has recognized that laws cannot condition fundamental rights upon the unbridled discretionary approval of a government official. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 113, fn 22 (1972):

> ... in numerous other cases, we have condemned broadly worded licensing ordinances which grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences. *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969);

Staub v. City of Baxley, 355 U.S. 313 (1958); *Saia v. New York*, 334 U.S. 558 (1948); *Schneider v. State*, 308 U.S. 147, 163-164 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Hague v. CIO*, 307 U.S. 496 (1939).

This recognition comes because "If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion' by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted..." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992) (internal citations omitted). *See also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990): "'It is settled by a long line of recent decisions of this Court that an ordinance which ... makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.'" (*citing Shuttlesworth, supra*, 394 U.S., at 151).

Pennsylvania's Act 169 contains the exact flaw that was condemned in *Cantwell* and the cases following its reasoning. It conditions the ability to exercise the right to homeschool one's child on a local superintendent's discretionary determination that "appropriate education" and "sustained progress" has occurred. Again, the Superintendent is not bound by the achievement test scores or the report

from the parent's professional reviewer. He may reject these submissions entirely and make a discretionary determination of "appropriate education" and "sustained progress" solely on his own personal judgment.

C. The Third Circuit Erred by Requiring Petitioners to Demonstrate Actual Bias in the State's Discretionary Review.

Both the District Court and the Third Circuit could not seem to get past the notion that Petitioners had neither sought nor been denied approval of the local superintendent. Moreover, they had been successful in the past in winning his favor in the discretionary review process. Yet such denial is not necessary for this argument. In *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), this Court noted that "there are a significant number of persons whose religious scruples will prevent them from applying for such a license. There are no doubt other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited debate in the context of door-to-door advocacy, that they would prefer silence to speech licensed by a petty official." *Id.* at 166.

The parents in this case raise precisely the same religious scruples that were recognized in *Village of Stratton*. These scruples will be more directly pertinent in the as applied challenge discussed below, but the Third Circuit's insistence that no constitutional case may be raised unless

these Petitioners are actually rejected after the process of this discretionary government review is simply not consistent with either *Village of Stratton* or *Cantwell*. In fact, this Court has repeatedly rejected the idea that a principled refusal to obtain government permission for the exercise of First Amendment rights hinders the ability of a litigant to challenge the requirement of governmental approval. In *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-757 (1988), this Court summarized a long line of cases:

> Recognizing the explicit protection accorded speech and the press in the text of the First Amendment, our cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license. E.g., *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) ("In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license"); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (in the First Amendment context, "[o]ne who might

> have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it"). See also *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969) ("'The Constitution can hardly be thought to deny to one subjected to the restraints of [a licensing law] the right to attack its constitutionality, because he has not yielded to its demands'" (quoting *Jones v. Opelika*, 316 U.S. 584, 602 (1942) (Stone, C. J., dissenting), adopted per curiam on rehearing, 319 U.S. 103, 104 (1943))). . . .(Footnotes omitted.)

This line of precedent is strong. The exercise of a fundamental right may not be made dependent upon obtaining discretionary approval by a local government official. This argument raises no challenge to any form of objective regulation of private education—whether homeschooling or institutional private schools—but merely the discretionary review.

All states have some type of regulation of homeschooling.[5] In some states a simple notification is required.[6] In general, homeschoolers must teach

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[5] See generally Home School Legal Defense Association, "State Laws," 2008, *available at* www.hslda.org/laws/default.asp (last accessed November 18, 2008).

[6] E.g., Ariz. Rev. Stat. § 15-802; Colo. Rev. Stat. § 22-33-104.5; N.H. Rev. Stat. Ann. § 193-A.

their children the same subjects found in the public schools;[7] there are days and hours of instruction required in many states;[8] standardized testing is often required;[9] and there are other variations on this theme.

Pierce makes it clear that parents have a fundamental constitutional right to choose private education. *Yoder* held that parents have the right to choose an unsanctioned path so long as their children are literate and self-sufficient. *Cantwell* held that the right of free exercise cannot be subjected to a licensing scheme involving discretionary review and approval. The application of these cases is clear. Act 169 is unconstitutional because local superintendents have the power to deny a family the right to continue homeschooling because of a purely discretionary determination that the schooling was not "adequate" or that it lacked "sustained progress."

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[7] E.g., Nev. Rev. Stat. Ann. § 392.700; Vt. Stat. Ann. Tit. 16, § 166b.

[8] E.g., N.Y. Comp. Codes R. & Regs. tit. 8, § 100.10; South Dakota Codified Laws § 13-27-3; Wash. Rev. Code Ann. § 28A.225.010.

[9] E.g., Ark. Stat. Ann. § 6-15-501 *et. seq.*; Ga. Code Ann. § 20-2-690; N.C. Gen. Stat. § 115C-547 *et seq.*

III. Act 169 Burdens the Petitioners' Exercise of Their Parental Rights and Religious Liberty.

Because the Third Circuit held that rational basis review applied to Petitioners' First Amendment challenge, it never squarely addressed the nature of the religious burden Act 169 imposed on Petitioners. When the "strict scrutiny" standard of judicial review is applied, Act 169 imposes a substantial burden.

In *Smith*, this Court recognized that "the 'exercise of religion' often involves not only belief and profession but the *performance of (or abstention from)* physical acts..." *Smith*, 494 U.S. at 877 (emphasis added). The Petitioners have not claimed that the temporal burdens imposed by Act 169 such as the effect on "the parents' health and expenditures of time and energy" are what entitle them to an exemption under the Free Exercise Clause. App. 158a. As the District Court opinion correctly points out, the Petitioners have each expressed a religious belief that "Act 169 places 'authority' over their children's education, which, to Plaintiffs, 'is religion,' in secular hands, and that placing of authority in any state agency violates their sincerely held religious beliefs." App. 238a. It is also accurate to state, as the District Court opinion does, that Petitioners believe that "'the Lord has established jurisdictional boundaries between the family and the State,' that 'subjecting their home education program to the authority, oversight and discretionary review of the State violates Biblically-

ordained jurisdictional lines between the family and the State.'" *Id.*

This description of the religious basis for the parents' refusal to seek discretionary approval by the superintendent is indistinguishable from the approach taken by the Jehovah's Witnesses in the recent case of *Village of Stratton* and prior cases such as *Murdock v. Pennsylvania* and *Schneider v. Town of Irvington*, 308 U.S. 147 (1939). All of these cases involved a conscientious refusal to seek government approval for religious activity. The reason for Mrs. Schneider's refusal was summarized as: "She did not apply for, or obtain, a permit pursuant to the ordinance because she conscientiously believed that so to do would be an act of disobedience to the command of Almighty God." *Id.* at 159.

In *Village of Stratton*, this Court concluded that the conflict between a statute which required a religious adherent to seek government sanction for protected activity and a conscientious refusal to do so constituted a burden of constitutional significance.

> [R]equiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views. As our World War II-era cases dramatically demonstrate, there are a significant number of persons whose religious scruples will prevent them from applying for such a license.

> There are no doubt other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited debate in the context of door-to-door advocacy, that they would prefer silence to speech licensed by a petty official.

Village of Stratton, 536 U.S. at 167.

As was the case in *Schneider*, the Petitioners all believe that to comply with Act 169 would be to disobey God. App. 6a, 117a. And choosing to obey their religious convictions in this case leads to criminal prosecution as it did in *Yoder*.

The Third Circuit has misapprehended the nature of the burden in *Yoder*, which this Court explicitly described in *Smith* as a parents' rights/free exercise hybrid. Rather than focusing on the religious nature of the burden, that is, the coercive rendering unto Caesar that which the religious adherent believes belongs exclusively to God, the Third Circuit determined that the Amish won a free exercise exemption in *Yoder* because the generally applicable law in that case imposed a "unique burden." App 45a.

The Third Circuit's attempt to make sense of *Yoder* further demonstrates the need for this Court to bring clarity to the "hybrid situation" discussion in *Smith*. On the one hand, the Third Circuit describes as dicta this Court's description of *Yoder* as an exception to the *Smith* general rule. On the other hand, the Third Circuit cannot explain the outcome

in *Yoder* in terms independent of the hybrid nature of the claim made by the Amish in that case.

It would be a constitutional anomaly to conclude that in *Yoder* this Court exempted the Amish from application of a general law, apart from a discernible constitutional rule that would apply to others besides the Amish.

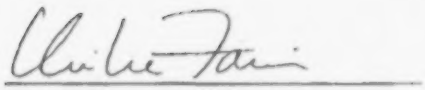
This Court has shown great sensitivity to the spiritual burden experienced by Jehovah's Witnesses when they refuse to seek approval of a government licensing official as a condition of conducting personal evangelism. They believe that they must obey God rather than man. This Court has found a way to honor their spiritual approach without eviscerating the ability of local communities to contain fraudulent solicitations.

Petitioners request nothing more than the fair application of this same rule to their spiritual convictions. They too refuse to seek the approval of a local government official because to do so would be to obey man rather than God.

If this Court holds that a burden is present in such a case, it will not lead to the conclusion that all regulations are invalid. Liberty does not eradicate common sense, but it demands that petty officials may never rule at their whim.

Conclusion

This Court should grant review.



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APPENDIX

ENTERED August 21, 2008

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 06-3090, 06-3091,
06-3092, 06-3093, 06-3094, 06-3095

MR. DARRELL COMBS;
MRS. KATHLEEN COMBS
Appellants at No. 06-3090

v.

HOMER-CENTER SCHOOL DISTRICT;
JOSEPH F. MARCOLINE, in his official capacity as
Superintendent of Homer-Center School District;
TITUSVILLE AREA SCHOOL DISTRICT;
BRISTOL TOWNSHIP SCHOOL DISTRICT;
FRANKLIN REGIONAL SCHOOL DISTRICT
(D.C. Civil Action No. 04-cv-1599)

DR. THOMAS PREVISH; TIMARI PREVISH
Appellants at No. 06-3091

v.

NORWIN SCHOOL DISTRICT;
RICHARD WATSON, in his official capacity as
Superintendent of Norwin School District
(D.C. Civil Action No. 04-cv-1670)

DR. MARK NEWBORN; MRS. MARYALICE NEWBORN
Appellants at No. 06-3092

v.

FRANKLIN REGIONAL SCHOOL DISTRICT; STEPHEN VAK, in his official capacity as Superintendent of Franklin Regional School District
(D.C. Civil Action 04-cv-1932)

MR. THOMAS HANKIN; MRS. BABETTE HANKIN
Appellants at No. 06-3093

v.

BRISTOL TOWNSHIP SCHOOL DISTRICT; REGINA CESARIO, in her official capacity as Superintendent of Bristol Township School District
(D.C. Civil Action 04-cv-1936)

MR. DOUGLAS NELSON; MRS. SHARI NELSON
Appellants at No. 06-3094

v.

TITUSVILLE AREA SCHOOL DISTRICT; JOHN D. REAGLE, in his official capacity as Acting Superintendent of Titusville Area School District
(D.C. Civil Action 05-cv-0070)

REV. STEVEN WEBER; MRS. MEG WEBER
Appellants at No. 06-3095

v.

DuBOIS AREA SCHOOL DISTRICT;
SHARON KIRK, in her official capacity as
Superintendent of DuBois Area School District
(D.C. Civil Action 05-cv-0203)

On Appeal from the United States District Court
for the Western District of Pennsylvania
(Honorable Arthur J. Schwab)

Argued November 6, 2007

Before: SCIRICA, *Chief Judge*,
AMBRO and JORDAN, *Circuit Judges*.

(Filed: August 21, 2008)

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OPINION OF THE COURT

PER CURIAM.

At issue is whether certain parents who home-school their children must comply with the reporting and review requirements of Pennsylvania's compulsory education law. Compliance, the parents contend, would violate their sincerely held religious beliefs. The Commonwealth of Pennsylvania demurs, contending its compulsory education law neither substantially burdens the free exercise of religion nor transgresses neutral application to all citizens, and serves an important state interest in ensuring a minimal level of education for all children.

Plaintiffs appeal from the grant of summary judgment for defendants in an action seeking declaratory relief and an injunction prohibiting enforcement of 24 Pa. Stat. Ann. § 13- 1327.1 ("Act 169") and prosecution under Pennsylvania's

compulsory education laws. Defendants are school districts in Pennsylvania and superintendents named in their official capacity.[1] Plaintiffs are six families who home-school their children.[2]

The Commonwealth of Pennsylvania's education system, as enacted by the General Assembly, allows parents to satisfy the compulsory attendance requirement through "home education programs." Parents supervising the home education programs must provide instruction for a minimum number of days and hours in certain subjects and submit a portfolio of teaching logs and the children's work product for review. The local school district reviews the home education programs for compliance with the minimum hours of instruction and course requirements and determines whether each student demonstrates progress in the overall program. The school district does not review the educational content, textbooks, curriculum, instructional materials, or methodology of the program.

Parents, who home-school their children based on their sincerely held religious beliefs, have sued their respective school districts and school

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[1] We refer to Homer-Center School District, Joseph F. Marcoline, Norwin School District, Richard Watson, Franklin Regional School District, Stephen Vak, Bristol Township School District, Regina Cesario, Titusville Area School District, John D. Reagle, DuBois Area School District and Sharon Kirk collectively as the "school districts."

[2] The "Parents" are Darrell and Kathleen Combs, Thomas and Timari Prevish, Mark and Maryalice Newborn, Thomas and Babette Hankin, Douglas and Shari Nelson, and Steven and Meg Weber.

superintendents. Parents contend the Act 169 record-keeping requirements and the subsequent portfolio review place a substantial burden on their free exercise of religion. They seek an exemption from the Act 169 requirements and request declaratory and injunctive relief on the grounds that the provisions of Act 169 violate the First and Fourteenth Amendments of the Constitution of the United States and the Pennsylvania Religious Freedom Protection Act ("RFPA"), 71 Pa. Stat. Ann. §§ 2401–2407.

I.

Parents have home-schooled their children for many years. All six families are Christians, but of different denominations. They hold in common a religious belief that" education of their children, not merely the religious education, is religion" and that God has assigned religious matters to the exclusive jurisdiction of the family. Accordingly, because God has given Parents the sole responsibility for educating their children, the school districts' reporting requirements and "discretionary review" over their home education programs violate their free exercise of religion.

In 2002, the Commonwealth of Pennsylvania passed the Religious Freedom Protection Act. The statute requires the. Commonwealth to justify substantial burdens on religious free exercise with a compelling interest and a showing that the least restrictive means has been employed to satisfy that interest. Prior to the passage of the Religious Freedom Protection Act, many of the Parents

complied with the Act 169 home education program requirements.[3] Pre-RFPA, there is no evidence that the school districts ever questioned or interfered with Parents' home education programs' educational content, methodology, curriculum, or materials. On some occasions, the school districts required Parents to supplement their logs and portfolios with additional information. But Parents are unable to identify an instance in which the school districts rejected any part of their home education program.

Nevertheless, post-RFPA, Parents notified the school districts that Act 169 substantially burdens their free exercise of religion and sought an exemption from compliance.[4] The school districts refused to grant Parents an exemption from Act 169 and threatened or, in some cases, initiated criminal prosecutions for truancy.

In response, Parents sued the school districts in various state and federal courts seeking declaratory and injunctive relief under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and RFPA. Ultimately, the cases ended up before the United States District Court for the Western District of

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[3] Thomas and Babette Hankin have never complied with Act 169

[4] *See* 71 Pa. Stat. Ann. § 2405(b) (requiring, prior to bringing an action in court, the party to provide the agency with written notice); § 2405(d) (the agency "may remedy the substantial burden on the person's free exercise of religion" within 30 days of the written notice). Darrell and Kathleen Combs refused to submit the required affidavits and portfolios, thereby ceasing to comply with Act 169.

Pennsylvania, which consolidated the six cases for pre-trial and summary judgment purposes. Upon consent of the parties, discovery was limited to "threshold legal issues" such as whether Act 169 substantially burdened Parents' free exercise of religion under the RFPA and the proper standard of review for Parents' federal constitutional claims. The District Court engaged in two rounds of summary judgment motions.

The first round addressed facial challenges to Act 169. Parents filed a consolidated motion for summary judgment and the school districts filed a consolidated opposition, but did not file a cross-motion for summary judgment. The District Court denied Parents' motion. *Combs v. Homer Ctr. Sch. Dist.*, 2005 WL 3338885 (W.D. Pa. Dec. 8, 2005). In the second round, the school districts filed a motion for summary judgment addressing both Parents' facial and "as applied" challenges to Act 169. The District Court granted the school districts' motion, concluding that (1) Parents failed to prove a "substantial burden" on the free exercise of religion, as defined by RFPA, *Combs v. Homer Ctr. Sch. Dist.*, 468 F. Supp. 2d 738, 771 (W.D. Pa. 2006), and (2) Act 169 is a neutral law of general applicability,

satisfying rational basis review,[5] *id.* at 777. As a result, the District Court did not decide issues of compelling governmental interest or least restrictive means.[6]

II.

A.

The Pennsylvania Constitution mandates that the General Assembly "provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the

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[5] The District Court also rejected Parents' claims based upon the Establishment Clause of the First Amendment, the Due Process Clause of the Fourteenth Amendment and the Free Speech Clause of the First Amendment. *Id.* at 778. The Statement of Issues in Parents' brief only addresses claims under RFPA and the Free Exercise Clause.

The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), 1367 and 1441. We have jurisdiction over the appeal under 28 U.S.C. § 1291. "We review a district court's grant of summary judgment *de novo*." *Lighthouse Inst. For Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 260 (3d Cir. 2007) (citing *Gottshall v. Consol. Rail Corp.*, 56 F.3d 530, 533 (3d Cir. 1995)). Summary judgment is only appropriate if there are no genuine issues of material fact and the school districts are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "In reviewing the District Court's grant of summary judgment, we view the facts in a light most favorable to the nonmoving party[:]" Parents. *Lighthouse Inst.*, 510 F.3d at 260.

[6] In a *dictum*, the District Court stated: "Even if this Court were to apply a 'hybrid rights' heightened or strict scrutiny test, however, Plaintiff's free exercise challenge to Act 169 on its face would still fail." *Id.* at 777.

Commonwealth." Pa. Const., Art. III, § 14. The General Assembly has carried out its constitutional charge by enacting the Public School Code. *See* 24 Pa. Stat. Ann. §§ 1- 101 to 27-2702.[7]

The Public School Code requires "every child of compulsory school age having a legal residence in this Commonwealth . . . to attend a day school in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language." 24 Pa. Stat. Ann. § 13-1327(a). "Compulsory school age" is defined as "the period of a child's life from the time the child's parents elect to have the child enter school, which shall be not later than at the age of eight (8) years, until the age of seventeen (17) years." *Id.* § 13-1326. *See also* 22 Pa. Code § 11.13 (2008). A student who "holds a certificate of graduation from a regularly accredited senior high school" satisfies the compulsory attendance requirement and is no longer

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[7] As noted by the District Court, "[a]n educated citizenry has been recognized as critical to the success and well-being of the Nation and its people from the time of its creation." *Combs*, 468 F. Supp. 2d at 740-41. Pennsylvania's commitment to public education is firmly rooted in its history. *See id.* at 741-43. In 1682, the "Great Law" passed by the First General Assembly of Pennsylvania "included a provision for the creation of schools across Pennsylvania." *Id.* at 742. Furthermore, the various Pennsylvania constitutions have included provisions for public education. *Id.* (citing the 1776 provisional Pennsylvania Constitution, the Pennsylvania Constitution of 1874, and Art. II, § 14 of the Pennsylvania Constitution in its current form). The current Pennsylvania Code describes the purpose of public education as "prepar[ing] students for adult life" and creating "self-directed, life-long learners and responsible, involved citizens." 22 Pa. Code. § 4.11(b) (2008).

of compulsory school age. 24 Pa. Stat. Ann. § 13-1326.

The Pennsylvania General Assembly currently permits parents to choose among four alternative categories of education to satisfy the compulsory attendance requirement: (1) a public school with certain trade school options, *id.* § 13-1327(a);[8] (2) a private academic day school or private tutoring, *id.*;[9] (3) a day school operated by a "bona fide church or

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[8] A child may satisfy the compulsory attendance requirement by attending a public day school. 24 Pa. Stat. Ann. § 13- 1327(a). "In lieu of such school attendance" any child fifteen years of age who receives approval of the district superintendent and the Secretary of Education, or any child sixteen years of age who receives approval of the district superintendent, may enroll in a trade or business school. *Id.* Attendance at either public day school or a trade or business school satisfies the mandate that "every parent, guardian, or other person having control or charge of any child or children of compulsory school age is required to send such child or children to a day school in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language." *Id.*

[9] A child may satisfy the compulsory attendance requirement by attending "an accredited or licensed private school," 22 Pa. Code § 11.32 (2008), "in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language." 24 Pa. Stat. Ann. § 13-1327(a). "The certificate of any principal or teacher of a private school, or of any institution . . ." must "set[] forth that the work of said school is in compliance with the provisions of this act." *Id.* Also, regular daily instruction in the English language by a properly qualified private tutor satisfies the compulsory attendance requirement. *Id.* The Pennsylvania Administrative Code enumerates minimum hours of instruction and the required subjects at both the elementary and secondary school levels. 22 Pa. Code § 11.31 (2008).

other religious body," *id.* § 13-1327(b);[10] or (4) a "home education program," *id.* § 13- 1327.1.

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[10] A child may enroll in a day school "operated by a bona fide church or other religious body." 24 Pa. Stat. Ann. § 13-1327(b). The school must meet minimum standards for hours of instruction and teach the subjects enumerated in the statute. *See id.* ("[A] minimum of one hundred eighty (180) days of instruction or nine hundred (900) hours of instruction per year at the elementary level or nine hundred ninety (990) hours per year of instruction at the secondary level . . . ."); *id.* § 13-1327(b)(1) (requiring at the elementary school level, the following courses: "English, to include spelling, reading and writing; arithmetic; science; geography; history of the United States and Pennsylvania; civics; safety education, including regular and continuous instruction in the dangers and prevention of fires; health and physiology; physical education; music; and art"); *id.* § 13-1327(b)(2) ("At the secondary school level, the following courses [must be] offered: English, to include language, literature, speech and composition; science, to include biology and chemistry; geography; social studies, to include civics, economics, world history, history of the United States and Pennsylvania; a foreign language; mathematics, to include general mathematics and statistics, algebra and geometry; art; music; physical education; health and physiology; and safety education, including regular and continuous instruction in the dangers and prevention of fires."). Further, the principal must file a notarized affidavit with the Department of Education setting forth that the required subjects are offered in the English language, whether the school is a nonprofit organization, and that the school is otherwise in compliance with the provisions of the Public School Code. *Id.* § 13-1327(b).

Although the statute requires religious schools to teach certain subjects, "[i]t is the policy of the Commonwealth to preserve the primary right and the obligation of the parent or parents . . . to choose the education and training for such child." *Id.* Thus, "[n]othing contained in this act shall empower the Commonwealth, any of its officers, agencies or subdivisions to approve the course content, faculty, staff or disciplinary

Significant to this appeal, the Pennsylvania General Assembly permitted the fourth alternative in 1988. *See* Act 169 of 1988, P.L. 1321, No. 169, December 21, 1988, 24 Pa. Stat. Ann. § 13-1327.1. Under Act 169, a child instructed under a "home education program" satisfies the compulsory attendance requirement. *Id.* A home education program must satisfy the same minimum hours of instruction requirements and almost all of the same subject matter requirements as a school operated by a bona fide church or religious body.[11] *Id.* §§ 13-1327(b), 13-1327.1(c).

Prior to the commencement of a home education program, and thereafter on August 1 of each year, the parent or guardian of the child must file an affidavit with the district superintendent setting forth:

> the name of the supervisor of the home education program who shall be responsible for the provision of

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requirements of any religious school referred to in this section without the consent of said school." *Id.*

[11] Act 169 enumerates the following "minimum courses in grades nine through twelve" as a requirement for graduation from a home education program: four years of English; three years of mathematics; three years of science; three years of social studies; two years of arts and humanities. 24 Pa. Stat. Ann. § 13-1327.1(d). But, in contrast to § 13-1327(b), Act 169 leaves the decision whether to teach certain secondary level subjects – economics, biology, chemistry, foreign languages, trigonometry, or other age-appropriate courses as contained in 22 Pa. Code Ch. 4 – to the discretion of the supervisor of the home education program. 24 Pa. Stat. Ann. § 13-1327.1(c)(2).

> instruction; the name and age of each child who shall participate . . . ; the address and telephone number of the . . . site; that such subjects as required by law are offered in the English language, including an outline of proposed education objectives by subject area . . . ; and that the home education program shall comply with the provisions of this section . . . .

Id. § 13-1327.1(b)(1).[12]

The superintendent of the public school district of the child's residence is charged with ensuring that each child is receiving "appropriate education," which is defined by Act 169 as "a program consisting of instruction in the required subjects for the time required in this act and in which the student demonstrates sustained progress in the overall program." *Id.* § 13-1327.1(a). In order

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[12] In addition, the affidavit must provide evidence that the child has been immunized and has received the health and medical services required for students of the child's age or grade level. 24 Pa. Stat. Ann. § 13-1327.1(b)(1). Further, "[t]he affidavit shall contain a certification to be signed by the supervisor that the supervisor, all adults living in the home and persons having legal custody of a child or children in a home education program have not been convicted of the criminal offenses enumerated in subsection (e) of section 111 within five years immediately preceding the date of the affidavit." *Id.* "Supervisor" is defined by Act 169 as "the parent or guardian or such person having legal custody of the child or children who shall be responsible for the provision of instruction, provided that such person has a high school diploma or its equivalent." *Id.* § 13-1327.1(a).

to demonstrate to the superintendent that "appropriate education" is taking place, at the end of each public school year the supervisor of the home education program must submit a file with two types of documentation.[13] First, the file must contain a portfolio of records and materials:

> The portfolio shall consist of a log, made contemporaneously with the instruction, which designates by title the reading materials used, samples of any writings, worksheets, workbooks or creative materials used or developed by the student and in grades three, five and eight results of nationally normed standardized achievement tests in reading/language arts and mathematics or the results of Statewide tests administered in these grade levels. The department shall establish a list, with a minimum of five tests, of nationally normed standardized tests from which the supervisor of the home education program shall select a test to be administered if the supervisor does not choose the Statewide tests. At the discretion of the supervisor, the portfolio may include the results of nationally normed standardized achievement tests for other subject

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[13] "In addition, if the superintendent has a reasonable belief that, at any time during the school year, appropriate education may not be occurring in the home education program, he may . . . require documentation . . . to be submitted to the district . . . ." 24 Pa. Stat. Ann. § 13-1327.1(h).

> areas or grade levels. The supervisor shall ensure that the nationally normed standardized tests or the Statewide tests shall not be administered by the child's parent or guardian.

Id. § 13-1327.1(e)(1).

Second, the supervisor of the home education program must obtain an annual written evaluation of the child's work. *Id.* § 13-1327.1(e)(2). The supervisor may choose any person qualified under Act 169 to make the evaluation.[14] The evaluation measures:

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[14] Act 169 permits 14 evaluation by "a licensed clinical or school psychologist or a teacher certified by the Commonwealth or by a nonpublic school teacher or administrator." 24 Pa. Stat. Ann. § 13-1327.1(e)(2). "Any such nonpublic teacher or administrator shall have at least two years of teaching experience in a Pennsylvania public or nonpublic school within the last ten years." *Id.* Further, any nonpublic teacher or administrator or certified teacher must have the required "experience at the elementary level to evaluate elementary students or at the secondary level to evaluate secondary students." *Id.*

> A teacher or administrator who evaluates a portfolio at the elementary level (grades kindergarten through six) shall have at least two years of experience in grading any of the following subjects: English, to include spelling, reading and writing; arithmetic; science; geography; history of the United States and Pennsylvania; and civics.

Id. § 13-1327.1(e)(1)(i).

> A teacher or administrator who evaluates a portfolio at the secondary level (grades seven through twelve) shall have at least two years of experience in grading any of the following

> the student's educational progress . . . . The evaluation shall also be based on an interview of the child and a review of the portfolio required in clause (1) and shall certify whether or not an appropriate education is occurring.

Id.

Based upon the entire file – the portfolio of records and materials and the third-party evaluation – the superintendent determines whether the home

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> subjects: English, to include language, literature, speech, reading and composition; science, to include biology, chemistry and physics; geography; social studies, to include economics, civics, world history, history of the United States and Pennsylvania; foreign language; and mathematics, to include general mathematics, algebra, trigonometry, calculus and geometry.

Id. § 13-1327.1(e)(1)(ii). "[T]he term 'grading' shall mean evaluation of classwork, homework, quizzes, classwork-based tests and prepared tests related to classwork subject matter." *Id.* § 13-1327.1(e)(1)(iii).

"At the request of the supervisor, persons with other qualifications may conduct the evaluation with the prior consent of the district of residence superintendent. In no event shall the evaluator be the supervisor or their spouse." *Id.* § 13-1327.1(e)(2).

education program provides the child with an "appropriate education."[15]

> If the superintendent . . . determines, based on the documentation provided . . . that appropriate education is not taking place for the child in the home education program, the superintendent shall send a letter . . . to the supervisor of the home education program stating that in his opinion appropriate education is not taking place for the child in the home education program and shall return all documentation, specifying what aspect or aspects of the documentation are inadequate.

Id. § 13-1327.1(i). Upon receipt of the letter, the supervisor has twenty days "to submit additional documentation demonstrating that appropriate education is taking place for the child in the home education program." *Id.* § 13-1327.1(j). If the additional documentation is not timely submitted, the home education program "shall be out of compliance" with the compulsory attendance requirements and the student must promptly enroll in either a public school, a nonpublic religious school, or a licensed private school. *Id.*

If the superintendent concludes that a timely amended file still fails to demonstrate appropriate

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[15] The superintendent may not rely upon the outline of proposed educational objectives provided at the beginning of the year when making his "appropriate education" determination. 24 Pa. Stat. Ann. § 13-1327.1(b)(1).

education, he or she will notify the supervisor of his or her determination. Further, the supervisor will be given a "proper hearing by a duly qualified and impartial hearing examiner" within thirty days. *Id.* § 13- 1327.1(k).[16] "If the hearing examiner finds that the documentation does not indicate that appropriate education is taking place in the home education program," the student must be promptly enrolled in either a public school, a nonpublic religious school, or a licensed private academic school.[17] *Id.* § 13-1327.1(l). "The decision of the [hearing] examiner may be appealed by either the supervisor of the home education program or the superintendent to the Secretary of Education or Commonwealth Court [of Pennsylvania]." *Id.* § 13-1327.1(k).

In practice, the school districts engage in a limited level of oversight. The school districts require a minimum of two contacts with the State during the calendar year – the submission of an affidavit at the beginning of the year and the submission of the portfolio and evaluation at the end of the year. Deposition testimony reveals that school officials do not check in on the progress of home education programs during the school year. Furthermore, all

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[16] The "hearing examiner" "shall not be an officer, employe [sic] or agent of the Department of Education or of the school district or intermediate unit of residence of the child in the home education program." *Id.* § 13-1327.1(a).

[17] In lieu of rendering a decision, the hearing examiner may "require the establishment of a remedial education plan mutually agreed to by the superintendent and supervisor of the home education program which shall continue the home education program." 24 Pa. Stat. Ann. § 13-1327.1(k).

school officials deposed acknowledged that they never disagreed with or rejected an independent evaluator's assessment of the home education program. School officials reviewed the disclosures for compliance with the statute and, if all the required disclosures were presented, the home education program would be approved.

B.

As noted, in 2002 the Pennsylvania General Assembly enacted the Religious Freedom Protection Act. 71 Pa. Stat. Ann. §§ 2401–2407. Titled "[a]n Act protecting the free exercise of religion; and prescribing the conditions under which government may substantially burden a person's free exercise of religion," *Id.* § 2401, the RFPA was based on two legislative findings:

> (1) Laws and governmental actions which are facially neutral toward religion, as well as laws and governmental actions intended to interfere with religious exercise, may have the effect of substantially burdening the free exercise of religion. However, neither State nor local government should substantially burden the free exercise of religion without compelling justification.
>
> (2) The General Assembly intends that all laws which it has heretofore enacted or will hereafter enact and all ordinances and regulations which have

> been or will be adopted by political subdivisions or executive agencies shall be construed so as to avoid the imposition of substantial burdens upon the free exercise of religion without compelling justification.

Id. § 2402.

Under RFPA, "an agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability," *id.* § 2404(a), unless "the agency proves, by a preponderance of the evidence, that the burden" is "[i]n furtherance of a compelling interest of the agency" and is "[t]he least restrictive means of furthering the compelling interest," *id.* § 2404(b).

The General Assembly provides definitions for several key terms in section 2404. First, "free exercise of religion means "[t]he practice or observance of religion under section 3 of Article I of the Constitution of Pennsylvania."[18] *Id.* § 2403.

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[18] Article I, Section 18 3 of the Pennsylvania Constitution provides:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall

Second, "person" is defined as "[a]n individual or a church, association of churches or other religious order, body or institution which qualifies for exemption from taxation under section 501(c)(3) or (d) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 501)." 71 Pa. Stat. Ann. § 2403. Third, RFPA defines "substantially burden" as "[a]n agency action which does any of the following:"

> (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs.
> (2) Significantly curtails a person's ability to express adherence to the person's religious faith. (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion.
> (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

Id.

RFPA allows a "person whose free exercise of religion has been burdened or likely will be burdened in violation of [§ 2404]" to bring a claim in a judicial proceeding. *Id.* § 2405(a). Prior to bringing a claim, the "person" must notify the agency, describing the agency action and the manner in which it burdens

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> ever be given by law to any religious establishments or modes of worship.

Pa. Const., Art. I, § 3.

religion. *Id.* § 2405(b). A "person" who "proves, by clear and convincing evidence, that the person's free exercise of religion has been burdened . . . in violation of [§ 2404]" may receive declaratory or injunctive relief. *Id.* § 2405(f). Monetary damages are not available. *Id.*

With limited exceptions, 71 Pa. Stat. Ann. § 2406(a)–(b), RFPA applies "to any State or local law or ordinance and the implementation of that law or ordinance, whether statutory or otherwise and whether adopted or effective prior to or after the effective date of this act," *id.* § 2406(a). Thus, RFPA applies to the Public School Code, 24 Pa. Stat. Ann. §§ 1-101 to 27-2702.

III.

We address Parents' federal constitutional claim. Parents contend Act 169 imposes a substantial burden on the free exercise of religion as protected by the First and Fourteenth Amendments.[19] The Commonwealth asserts Act 169 is a neutral law of general applicability that is rationally related to the legitimate governmental interest in ensuring a minimal level of education for all children. Applying rational basis review, the District Court concluded that "Act 169 passes constitutional muster as a neutral law of general applicability and effect." *Combs*, 468 F. Supp. 2d at 777. Accordingly, the District Court denied Parents' motion for summary judgment as to the facial

[19] The Free Exercise Clause applies to states and local governments through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

challenge to Act 169 as a violation of the First Amendment of the United States Constitution and granted the school districts' motion for summary judgment as to Parents' as-applied challenges.

A.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990), the Supreme Court held "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993); *see also Smith*, 494 U.S. at 879 ("[T]he right to free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."). The District Court concluded that "Act 169 is a neutral law of general applicability to all Pennsylvania home schoolers and their home education programs, with no reference or special impact on religious practices . . . ." *Combs*, 468 F. Supp. 2d at 772. As a result, the District Court applied the rational basis test to Parents' challenge of Act 169 and upheld the provision. *Id.* at 777.

In *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), we applied the standards for a neutral law of general applicability articulated by the Court in *Hialeah*. First, a law must be both facially and actually neutral. "A law is 'neutral' if it does not target religiously motivated conduct either

on its face or as applied in practice." *Blackhawk*, 381 F.3d at 209; *see also Hialeah*, 508 U.S. at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."). Second, the government cannot advance its interests solely by targeting religiously motivated conduct. Instead, the regulation must be generally applicable.

> A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.

Blackhawk, 381 F.3d at 209; *see also Hialeah*, 508 U.S. at 543 ("The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.").

Act 169 is a neutral law of general applicability. It neither targets religious practice nor selectively imposes burdens on religiously motivated conduct. Instead, it imposes the same requirements on parents who home-school for secular reasons as on parents who do so for religious reasons.

Furthermore, nothing in the record suggests Commonwealth school officials discriminate against religiously motivated home education programs (e.g., denying approval of home education programs because they include faith-based curriculum materials).

Parents contend Act 169 is not a law of general applicability and is tantamount to a licensing scheme for home-schooling. They cite *Blackhawk*, 381 F.3d at 209-10, for the proposition "that a statute with a waiver mechanism creates a regime of individualized, discretionary exemptions that triggers strict scrutiny." Parents Reply Br. at 8-9. Parents' depiction of Act 169 is mistaken and their reliance on *Blackhawk* is misplaced.

As noted, there are four ways to fulfill the compulsory education requirement. None of the options is an exemption from the compulsory education law. All four require that a child be educated in the required subjects for the required period. Furthermore, all parents who choose the home education program alternative, whether for religious or secular reasons, are required to fulfill the Act 169 requirements. Parents cite no statutory waiver mechanism that gives the school districts the authority to waive or exempt some parents from the disclosure and review requirements.

In *Blackhawk*, the Pennsylvania Wildlife Code contained specific statutory exemptions authorizing the director of the Game Commission to waive a permit fee "where hardship or extraordinary circumstance warrants." *Id.* at 205. Further, the

court stated: "[w]e are not presented here with a neutral and generally applicable [provision] that is uniformly imposed without allowing individualized exemptions. Under *Smith*, such a scheme . . . would not trigger strict scrutiny, and a person seeking to be excused [from the provision's requirements] on religious grounds would be unlikely to prevail." *Id.* at 212. Act 69 is a neutral law of general applicability and does not allow individualized exemptions. *Blackhawk* is distinguishable.

Since Act 169 is a neutral law of general applicability, we will apply rational basis review unless an exception to the *Smith* rule applies. "[R]ational basis review requires merely that the action be rationally related to a legitimate government objective." *Tenafly Eruv Ass'n, Inc. v. Tenafly*, 309 F.3d 144, 165 n.24 (3d Cir. 2002). "Under rational basis review, 'a statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not that basis has a foundation in the record.'" *Lighthouse Inst.*, 510 F.3d at 277 (quoting *Heller v. Doe*, 509 U.S. 312, 321 (1993)).

The Commonwealth has a legitimate interest in ensuring children taught under home education programs are achieving minimum educational standards and are demonstrating sustained progress in their educational program. *See, e.g., Bd. of Educ. v. Allen*, 392 U.S. 236, 245-47 & n.7 (1968) ("[A] substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory attendance

laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction . . . . [I]f the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925) (acknowledging the "power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils"). In *Brown v. Board of Education*, the Supreme Court noted the importance of education and the meaningful role the state plays in preparing a child for citizenship and adult life:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably

> be expected to succeed in life if he is denied the opportunity of an education.

347 U.S. 483, 493 (1954). Act 169's disclosure requirements and corresponding school district review rationally further these legitimate state interests. Accordingly, Act 169 survives rational basis review.

B.

Parents assert their claim falls within a "hybrid-rights" exception the Supreme Court discussed in *Smith*:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, *see Cantwell v. Connecticut*, [310 U.S., at 304-307] (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, [319 U.S. 105 (1943)] (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, [321 U.S. 573 (1944)]

> (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters*, [268 U.S. 510 (1925)], to direct the education of their children, *see Wisconsin v. Yoder*, [406 U.S. 205 (1972)] (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

Smith, 494 U.S. at 881. Parents contend Act 169 substantially burdens both their free exercise of religion and their fundamental right as parents, under the Fourteenth Amendment, to direct the education and upbringing of their children. Accordingly, they invoke the hybrid-rights exception of *Smith*, seeking strict scrutiny review. Alternatively, Parents contend that, notwithstanding our hybrid-rights determination, *Wisconsin v. Yoder* remains good law and the same constitutional test applies here.

1.

Although we have discussed the *Smith* hybrid-rights theory in prior opinions, its meaning and application remains an open question in our circuit. *See Blackhawk*, 381 F.3d at 207 (noting, while discussing *Smith*, "the Court did not overrule prior decisions in which 'hybrid claims' . . . had prevailed against 'neutral, generally applicable laws,'" but deciding case on other grounds); *Tenafly*, 309 F.3d at 165 n.26 (noting "[s]trict scrutiny may . . . apply when a neutral, generally applicable law incidentally

burdens" hybrid rights); *Salvation Army v. Dep't of Cmty. Affairs*, 919 F.2d 183, 200 (3d Cir. 1990) (finding"[b]ecause the present controversy does not concern any state action directly addressed to religion, [The Salvation Army] cannot receive protection from the associational right derived from the free exercise clause"). We have never decided a case based on a hybrid-rights claim, let alone the type of a hybrid-rights claim invoked here – one based on the Free Exercise Clause and the companion right to direct a child's upbringing.

Smith's hybrid-rights theory has divided our sister circuits. Some characterize the theory as dicta and others use different standards to decide whether a plaintiff has asserted a cognizable hybrid-rights claim. The United States Courts of Appeals for the Second and Sixth Circuits have concluded the hybrid-rights language in *Smith* is dicta. *See Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003) (citing *Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001)); *Watchtower Bible & Tract Soc'y of New York, Inc. v. Stratton*, 240 F.3d 553, 561-62 (6th Cir. 2001), *rev'd on other grounds*, 536 U.S. 150 (2002); *Kissinger v. Bd. of Trs. of Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 180 (6th Cir. 1993). Furthermore, the United States Court of Appeals for the Sixth Circuit views the hybrid-rights exception as "completely illogical," *Kissinger*, 5 F.3d at 180, and the United States Court of Appeals for the Second Circuit "can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have

been violated," *Leebaert*, 332 F.3d at 144.[20] Accordingly, when faced with a neutral law of general applicability, both appellate courts decline to allow the application of strict scrutiny to hybrid-rights claims and instead apply *Smith*'s rational basis standard. *See Leebaert*, 332 F.3d at 144 ("'[A]t least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard' to evaluate hybrid claims." (quoting *Kissinger*, 5 F.3d at 180)).

The United States Courts of Appeals for the First Circuit and District of Columbia have acknowledged that hybrid-rights claims may warrant heightened scrutiny, but have suggested

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[20] Justice Souter, 20 concurring in *Hialeah*, also criticized the hybrid-rights theory:

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all. *Hialeah*, 508 U.S. at 567 (Souter, J., concurring).

that a plaintiff must meet a stringent standard: the free exercise claim must be conjoined with an independently viable companion right. *See Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) (rejecting the "hybrid claim" argument that "the combination of two untenable claims equals a tenable one"); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (finding that the EEOC's violation of the Establishment Clause triggered the hybrid-rights exception); *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 18-19 (1st Cir. 2004) (citing *Gary S. v. Manchester Sch. Dist.*, 241 F. Supp. 2d 111, 121 (D.N.H. 2003)) (affirming, for the same reasons, the district court's rejection of a hybrid-rights claim because the free exercise claim was not conjoined with an independently viable companion claim); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (rejecting a hybrid-rights claim because "[plaintiff's] free exercise challenge is . . . not conjoined with an independently protected constitutional protection").[21]

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[21] In *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), the United States Court of Appeals for the First Circuit rejected plaintiff parents' claims that they must be given prior notice by a public school and an opportunity to exempt their young children from reading books the parents find religiously repugnant. In discussing hybrid-rights claims, the court stated that the strength of the companion constitutional claim required to establish a hybrid situation remains unsettled in the First Circuit because the *Brown* opinion did not "explicitly" decide the issue. *Id.* At 98 n.9. It also noted that "the parental rights claim asserted in that case was found to be so weak that it was not a colorable claim, much less an independently viable one." *Id.* The *Parker* court chose not to "enter[] the fray over the meaning and application of *Smith*'s 'hybrid situations' language," and instead "approach[ed] the parents' claims as the Court did in *Yoder*. In that case, the Court did not analyze

This stringent approach requiring an independently valid companion claim has received criticism, most notably that such a requirement would make the free exercise claim superfluous. *See Hialeah*, 508 U.S. at 567 (Souter, J., concurring) ("[I]f a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid casesto have mentioned the Free Exercise Clause at all."); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1296-97 (10th Cir. 2004) ("[I]t makes no sense to adopt a strict standard that essentially requires a *successful* companion claim because such a test would make the free exercise claim unnecessary. If the plaintiff's additional constitutional claim is successful, he or she would typically not need the free exercise claim and the hybrid-rights exception would add nothing to the case.").

The United States Courts of Appeals for the Ninth and Tenth Circuits[22] recognize hybrid rights

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separately the due process and free exercise interests of the parent-plaintiffs, but rather considered the two claims interdependently, given that those two sets of interests inform one other." *Id.* at 98. The court ultimately found that plaintiffs did not describe "a constitutional burden on their rights" and affirmed the district court's dismissal for failure to state a claim. *Id.* at 99.

[22] Although the United States Court of Appeals for the Seventh Circuit has not definitively articulated its approach, it has approvingly quoted the United States Court of Appeals for the Ninth Circuit. *See Civil Liberties for Urban Believers v Chicago*, 342 F.3d 752, 765 (7th Cir. 2003) (quoting *Miller v*

and require a plaintiff to raise a "colorable claim that a companion right has been violated." *San Jose Christian Coll. v. Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004); *see also Axson-Flynn*, 356 F.3d at 1297. They define colorable as "a fair probability or a likelihood, but not a certitude, of success on the merits." *San Jose Christian Coll.*, 360 F.3d at 1032; *Axson-Flynn*, 356 F.3d at 1297. They characterize this fact-driven, case-by-case inquiry as "a middle ground between two the extremes of painting hybrid-rights claims too generously and construing them too narrowly." *Axson-Flynn*, 356 F.3d at 1295. A plaintiff cannot "simply invoke the parental rights doctrine, combine it with a claimed free-exercise right, and thereby force the government to demonstrate the presence of a compelling state interest." *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998). Nor is one required to establish that the challenged law independently violates a companion constitutional right alone, without any recognition of the Free Exercise Clause.

By requiring a "colorable claim" that a companion right has been violated, the United States Courts of Appeals for the Ninth and Tenth Circuits examine "the claimed infringements on the party's claimed rights to determine whether either the claimed rights or the claimed infringements are

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Reed, 176 F.3d 1202, 1207-08 (9th Cir. 1999)); *but see id.* (citing *Brown*, 68 F.3d at 539 and *Kissinger*, 5 F.3d at 180). The United States Court of Appeals for the Eighth Circuit has recognized the existence of hybrid rights but has not defined the contours of the analysis. *See Cornerstone Bible Church v. Hastings*, 948 F.2d 464, 474 (8th Cir. 1991) (reversing and remanding to district court to consider hybrid-rights claim).

genuine." *Swanson*, 135 F.3d at 699. Thus, in order to trigger heightened scrutiny, a hybrid-rights plaintiff must show a fair probability or likelihood, but not a certitude, of success on the merits of his companion constitutional claim.

In *Smith*, the Court asserted that the case before it "[did] not present . . . a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right." 494 U.S. at 882. The criterion applicable to a free exercise claim combined with a companion constitutional right was left undefined. *See, e.g.*, *Kissinger*, 5 F.3d at 180 (noting that the *Smith* Court "did not explain how the standards under the Free Exercise Clause would change depending on whether other constitutional rights are implicated"). Since *Smith*, a majority of the Court has not confirmed the viability of the hybrid-rights theory.[23] Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta.

2.

Even if we were to apply the approaches used by our sister circuits – "colorable" claim approach and independently viable claim approach – we would find Parents' arguments unconvincing. Under either

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[23] As noted, Justice Souter, concurring in *Hialeah*, criticized the hybrid-rights theory. *Hialeah*, 508 U.S. at 566-67 (Souter, J., concurring). Furthermore, in *Boerne v. P.F. Flores*, 521 U.S. 507 (1997), the Court noted, without further discussion or explanation, that *Yoder* "implicated" the right to free exercise of religion and the right of parents to control their children's education. *Boerne*, 521 U.S. at 514.

approach, we must determine whether Parents can establish a hybrid-rights claim by asserting combined violations of the Free Exercise Clause and the companion right of a parent under the Fourteenth Amendment to direct a child's education. Parents have not presented an independent or colorable companion claim and, accordingly, cannot establish a valid hybrid-rights claim.

"The Due Process Clause guarantees more than fair process . . . . The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). In *Glucksberg*, the Supreme Court articulated the fundamental rights protected by the Due Process Clause. *Id.* at 719-20. Included in the list was the right "to direct the education and upbringing of one's children." *Id.* at 720 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925)); *see also Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion) ("[T]he Due Process Clause of the Fourteenth, Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

Parents rely on three Supreme Court cases to generally identify a parent's constitutional right to direct a child's education. *See Meyer v. Nebraska*, 262 U.S. 390, 401-03 (1923) (holding state law prohibiting foreign language instruction violated the "power of parents to control the education of their own"); *Pierce*, 268 U.S. at 535-36 (holding state

compulsory education law requiring students to attend solely public schools "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children under their control"); *Wisconsin v. Yoder*, 406 U.S. 205, 214, 234-36 (1972) (finding a compulsory education system, as applied to the Amish, to violate the Free Exercise Clause and the "traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, 'prepare (them) for additional obligations'"). But the particular right asserted in this case – the right to be free from all reporting requirements and "discretionary" state oversight of a child's home-school education – has never been recognized.

Although Parents assert the fundamental nature of their general right, it is a limited one. We have noted "[t]he Supreme Court has never been called upon to define the precise boundaries of a parent's right to control a child's upbringing and education. It is clear, however, that the right is neither absolute nor unqualified." *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3d Cir. 2005). "The case law in this area establishes that parents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject." *Swanson*, 135 F.3d at 699.[24] Furthermore,

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[24] Federal courts addressing the issue have held that parents have no right to exempt their child from certain subjects, reading assignments, community-service requirements or assembly programs they find objectionable. *See, e.g., Parker*, 514 F.3d at 107 (reading assignment); *Leebaert*, 332 F.3d at 144 (health education class); *Herndon v.*

> [t]he Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.

Runyon v. McCrary, 427 U.S. 160, 178 (1976).[25]

In addition to *Yoder*, discussed *infra*, Parents rely on *Meyer* and *Pierce* for foundational support. Read together, the cases

> evince the principle that the state cannot prevent parents from choosing a specific educational program – whether it be religious instruction at a private

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Chapel Hill-Carrboro City Bd. Of Educ., 89 F.3d 174 (4th Cir. 1996) (community-service requirement); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461-62 (2d Cir. 1996) (community-service requirement); *Brown*, 68 F.3d at 539 (sexual education assembly); *see also Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005) (finding that a parent "does not have a fundamental right to exempt his child from the school dress code").

[25] Parents who home-school their children may be subjected to standardized testing to ensure the children are receiving an adequate education. *See Murphy v. Arkansas*, 852 F.2d 1039, 1044 (8th Cir. 1988) (upholding state standardized test requirement over home-schooling parents' First and Fourteenth Amendment objections).

> school or instruction in a foreign language. That is, the state does not have the power to "standardize its children" or "foster a homogenous people" by completely foreclosing the opportunity of individuals and groups to choose a different path of education.

Brown, 68 F.3d at 533; *see also Runyon*, 427 U.S. at 177 (stressing the "limited scope" of *Meyer* and *Pierce*). In the present case, Parents are given the freedom to choose a "different path of education" – home-schooling – subject only to the Act 169 requirements. The school districts do not have any role in selecting the program Parents wish to follow. Parents are unable to point to a single instance in which the school districts have limited or interfered with their religious teachings and/or materials.

In her deposition, Shari Nelson acknowledged that her local school district never questioned or rejected her affidavits and did not interfere with her religious content choices. Mrs. Nelson noted she was never concerned that the local school district would reject her children's portfolio if it contained work product with a religious subject matter. Similarly, Maryalice Newborn acknowledged that her local school district never questioned the appropriateness of her home education program or its content.

Parents nevertheless contend that the Commonwealth's "subjective" and "discretionary" review over the Act 169 disclosures violates their right to control their children's education. They insist any review of the home education programs

must be purely "objective." In other words, they contend the Commonwealth usurps the religious and parental rights of parents when an official makes a limited determination of whether a child has "sustained progress in the overall program." Parents have not articulated their definition of "objective" in their brief. When questioned during oral argument, Parents' counsel was unable or unwilling to provide a concrete explanation or example of an "objective" review. Furthermore, it is difficult to accept Parents' assertion that review of a child's educational progress can truly be objective. The grading of an essay, even on a pass/fail scale, will always be imbued with some element of subjectivity.

As noted, there is no recognized right for parents to educate their children "unfettered by reasonable government regulation." *Runyon*, 427 U.S. at 178. The Court in *Pierce* expressly acknowledged "'the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils.'" *Id.* (quoting *Pierce*, 268 U.S. at 534); *see also Meyer*, 262 U.S. at 402 (noting "[t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools . . . [was] not questioned" by the parties).[26] Furthermore, there is

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[26] In a different context, the Supreme Court stated:

> Since *Pierce*, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of

"a distinction between actions that strike at the heart of parental decision-making authority on matters of the greatest importance and other actions that . . . are not of constitutional dimension." *C.N.*, 430 F.3d at 184. Parents identify the general right to control the education of one's child. But Parents do not have a constitutional right to avoid reasonable state regulation of their children's education. Act 169's reporting and superintendent review requirements ensure children taught in home education programs demonstrate progress in the educational program. The statute does not interfere, or authorize any interference, with Parents' religious teachings and/or use of religious materials. Parents' claim under the Fourteenth Amendment is of insufficient constitutional dimension to state either an independently viable or colorable claim. Accordingly, under both the stringent and colorable hybrid-rights approaches of our sister circuits, Parents have not asserted a "hybrid-rights claim."

> instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce v. Society of Sisters*: if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular education function.

Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 245-47 (1968) (examining validity of a New York statute requiring school districts to purchase and loan textbooks to students enrolled in parochial schools).

3.

Parents also contend that, notwithstanding the different standards articulated by the circuits regarding hybrid-rights claims, they raise the same type of claim as the parents in *Yoder*. They contend that since *Yoder* is still good law, parents claiming a religious-parental exemption to a neutral law of general applicability get the benefit of the traditional Free Exercise test. Parents assert that "it is beyond legitimate question that the same constitutional tests employed in *Yoder* must be used here to evaluate these Parents' religious-parental claims." Parents Br. at 27.

In *Yoder*, the Court granted a religious-based exception to a regulation of general applicability. *C.f.* John E. Nowak & Ronald D. Rotunda, Constitutional Law § 17.6 (7th ed. 2004) ("*Yoder* stands out as the one instance in which the Court required the government to grant to persons who could not comply with the law due to their religious beliefs an exemption from a law regulating the conduct of all persons . . . ."). But the unique burden suffered by the Amish, combined with the Supreme Court's limiting language, distinguish *Yoder* from this case.

In response to objections by Amish citizens, the *Yoder* Court held that the First Amendment required a partial exemption from a Wisconsin compulsory high-school education law requiring children to attend public or private school until age 16. The Amish refused to send their children, ages 14 and 15, to school after completion of the eighth

grade of schooling. The Court noted the Amish's "convincing showing:"

> the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others.

Yoder, 406 U.S. at 235. The Court applied a heightened level of scrutiny and found the State's interest lacking. *Id.* at 235-36.

Parents favor a broad reading of *Yoder* and insist that it applies to all citizens. But *Yoder*'s reach is restricted by the Court's limiting language and the facts suggesting an exceptional burden imposed on the plaintiffs. In *Yoder*, the religious beliefs of the Amish were completely integrated with their community and "mode of life."[27] *Yoder*, 406 U.S. at 235. As a result, compulsory attendance would "substantially interfer[e] with the religious development of the Amish child and his integration into the way of life of the Amish faith community." *Id.* at 218. Accordingly, the Wisconsin law carried "a

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[27] This "mode of life" reference in *Yoder* has been interpreted to refer to a distinct community and way of life, not simply the centrality of one's belief to his or her faith. *See Parker*, 514 F.3d at 100.

very real threat of undermining the Amish community and religious practice," *id.*, and placed the continued survival of Amish communities in "danger," *id.* at 218 n.9. Compulsory attendance "prevented these Amish parents from making *fundamental* decisions regarding their children's religious upbringing and effectively overrode their ability to pass their religion on to their children, as their faith required." *Parker*, 514 F.3d at 99-100 (citing *Yoder*, 406 U.S. at 233-35).

Before applying a heightened level of scrutiny, the Court wanted to ensure that the "Amish religious faith and their mode of life are, as they claim, inseparable and interdependent." *Yoder*, 406 U.S. at 215. Recognizing the exceptional nature of the Amish's showing, the Court held: "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." *Id.* at 233; *see also Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1067 (6th Cir. 1987) ("*Yoder* rested on such a singular set of facts that we do not believe it can be held to announce a general rule . . . .").

The United States Court of Appeals for the Second Circuit has interpreted the central underpinning of *Yoder* to be the "threat to the Amish community's way of life, posed by a compulsory school attendance statute." *Leebaert*, 332 F.3d at 144. In *Leebaert*, a parent alleged a violation of the First and Fourteenth Amendments because a school

refused to excuse his son from a mandatory health and education course. While not questioning the sincerity of the parent's beliefs, the Second Circuit found the claims were not governed by *Yoder*. *See id.* (plaintiff did not allege that "his community's entire way of life is threatened;" plaintiff "does not assert that there is an irreconcilable *Yoder*-like clash between the essence of [plaintiff's] religious culture and the mandatory health curriculum that he challenges"); *see also Brown*, 68 F.3d at 539 (distinguishing *Yoder* because a one-time compulsory attendance at a health program did not threaten "their entire way
of life").

In the pre-*Smith* case *New Life Baptist Church Academy v. East Longmeadow*, 885 F.2d 940 (1st Cir. 1989), a religious school asserted a remarkably similar claim to Parents' claim. The New Life Baptist Church Academy refused to comply with state rules and procedures for determining the adequacy of the secular education provided by the school because it believed "it is a sin to 'submit' [its] educational enterprise to a secular authority for approval." *Id.* at 941. Finding that "the weight of legal precedent is strongly against the Academy's position," *id.* at 950, the United States Court of Appeals for the First Circuit concluded that "this case differs significantly from [*Yoder*]," *id.* at 951.[28] It noted that the state's procedures

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[28] As noted, *New Life Baptist* 28 *Church Academy* was decided before *Smith*. Accordingly, the First Circuit applied the *Sherbert* test, *New Life Baptist Church Acad.*, 885 F.2d at 944 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)), and analyzed *Yoder* within the "less restrictive alternative " context. *New*

> do not threaten interference with religious practices, prayer, or religious teaching; and the record, while indicating a sincere religious scruple, does not suggest that enforcement of the [state] procedures would destroy a religious community's way of life. Nor does the record support the view that the Academy, left on its own, would provide "ideal" or even adequate secular education. All these factors make this case quite unlike *Yoder*.

Id. (citations omitted).

Similarly, the claim raised by the Amish parents in *Yoder* can be distinguished from the claim raised by Parents here. Act 169 does not threaten Parents' or their community's entire mode of life. Even though Parents are required to keep records and submit them for review, they are in complete control of the religious upbringing of their children. In fact, Parents are unable to point to even one occasion in which the school districts have questioned their religious beliefs, texts, or teachings.

The dispute in *Yoder* involved an additional one or two years of education at public schools versus "vocational" education at home. The Amish allowed their children to attend public schools until eighth grade and sought only a partial exemption from the state's compulsory school attendance law.

Life Baptist Church Acad., 885 F.2d at 948-52. Despite this, we find the First Circuit's discussion of *Yoder* to be informative.

Furthermore, the Court in *Yoder* assumed the state would regulate the Amish's home education to ensure the satisfaction of educational standards. *See Yoder*, 406 U.S. at 236 ("The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance . . . ."). In contrast, Parents request a full exemption from Act 169, seeking to administer their children's entire primary and secondary education without any review by the Commonwealth. They cite *Yoder* to challenge the government's authority to engage in the regulation and discretionary review of their home education programs.[29]

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[29] In *Duro v. Dist. Attorney, Second Judicial Dist.*, 712 F.2d 96 (4th Cir. 1983), plaintiffs, who home-schooled their children, alleged that the state compulsory school attendance law infringed upon their religious beliefs. The district court, relying heavily upon *Yoder*, found the state law unconstitutional as applied to the plaintiffs. The Fourth Circuit reversed, distinguishing *Yoder*. *Duro*, 712 F.2d at 98-99.

> [I]n *Yoder*, the Amish children attended public school through the eighth grade and then obtained informal vocational training to enable them to assimilate into the self-contained Amish community. However, in the present case, [plaintiff] refuses to enroll his children in any public or nonpublic school for any length of time, but still expects them to be fully integrated and live normally in the modern world upon reaching the age of 18.

Id. at 98.

Parents' claim is distinguishable from the Amish parents' claim in *Yoder*.

C.

Since Act 169 survives rational basis review and since Parents have failed to establish that an exception to *Smith*'s neutral law of general applicability rule applies, Parents' federal constitutional claims fail.

IV.

In addition to their federal constitutional claims, Parents assert a state statutory claim under the Religious Freedom Protection Act, 71 Pa. Stat. Ann. §§ 2401–2407. In order to obtain relief under RFPA, Parents must prove by clear and convincing evidence that their "free exercise of religion has been burdened or likely will be burdened in violation of [§

Although Parents contend they can "readily demonstrate" that their children will be self-sufficient even if they do not submit their children's work on an annual basis to a government official for his review, Parents Br. at 31, their claim remains distinguishable. The Amish allowed their children to attend public schools until the completion of 8th grade. Therefore, the State was assured that the Amish children received a state approved education and the Court found an additional one or two years of compulsory formal education to be insufficient to overcome the Amish's interests. In this case, Parents seek to home-school their children for their entire primary and secondary education.

2404]."[30] *Id.* § 2405(f). If Parents satisfy this burden, the school districts are required to prove, by a preponderance of the evidence, that Act 169 furthers a compelling interest and is the least restrictive means of furthering the interest. 71 Pa. Stat. Ann. § 2404(a)–(b). Thus, as a threshold matter, Parents must prove, by clear and convincing evidence, that their free exercise of religion has or will likely be "substantially burdened."[31]

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[30] Section 2404 states:

> (a) General rule. Except as provided in subsection (b), an agency shall not *substantially burden* a person's free exercise of religion, including any burden which results from a rule of general applicability.
> (b) Exceptions. An agency may *substantially burden* a person's free exercise of religion if the agency proves, by a preponderance of the evidence, that the burden is all of the following:
>
> > (1) In furtherance of a compelling interest of the agency.
> > (2) The least restrictive means of furthering the compelling interest.

Id. § 2404 (emphases added).

[31] As noted, RFPA 31 defines "substantially burden" as:

> An agency action which does any of the following: (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs. (2) Significantly curtails a person's ability to express adherence to the person's religious faith. (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion. (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

71 Pa. Stat. Ann. § 2403.

The District Court concluded Parents failed to establish by clear and convincing evidence that Act 169 substantially burdens their free exercise of religion. *Combs*, 468 F. Supp. 2d at 771. It granted the school districts' motion for summary judgment on both the facial and as-applied challenges based on the RFPA. *Id.* Parents assert error, contending the District Court either failed to review or misapplied the actual text of the statute. Further, they argue that because the fourth definition of "substantially burden" is clear and unambiguous, the District Court improperly resorted to extraneous sources like legislative history and federal cases interpreting the federal Free Exercise Clause and the federal Religious Freedom Restoration Act.

Parents invoke the fourth definition of "substantially burden" – "[c]ompels conduct or expression which violates a specific tenet of a person's religious faith." 71 Pa. Stat. Ann. § 2403. Parents contend Act 169 compels "conduct or expression" by requiring them to submit the content and records of their children's educational progress to the school districts. Because these submissions are subject to review and approval by the school districts, Parents contend Act 169 violates a "specific tenet" of their religious faith – that "education of their children, not merely the 'religious education,' is 'religion' and is assigned by God to the jurisdiction of the family." Parents Br. at 64.

The construction and application of RFPA's fourth definition of "substantially burden" is an issue

of first impression[32] and a matter of Pennsylvania law. As noted, the District Court's jurisdiction was based upon 28 U.S.C. §§ 1331, 1343(a)(3), 1367 and 1441. Because we affirm the District Court's grant of summary judgment on all of Parents' federal claims, only their state law claim remains. Under 28 U.S.C. § 1367(c), "district courts may decline to exercise supplemental jurisdiction" over a state law claim if "the claim raises a novel or complex issue of State law . . . [or] the district court has dismissed all claims over which it has original jurisdiction." *Id.* Section 1367(c) provides courts "the discretion to refuse to exercise supplemental jurisdiction when 'values of judicial economy, convenience, fairness, and comity' counsel that the district court remand state claims to a state forum." *Hudson United Bank v. LiTenda Mortgage Corp.*, 142 F.3d 151, 157 (3d Cir. 1998) (quoting *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 173 (1997)). A decision to remand under section 1367 "reflects the court's judgment . . . that at the present stage of litigation it would be best for supplemental jurisdiction to be declined so that state issues may be adjudicated by a state court." *Hudson United Bank*, 142 F.3d at 158 (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966)).

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[32] In 2007, the Commonwealth 32 Court of Pennsylvania interpreted the third definition of substantially burden – "[d]enies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion." *Ridley Park United Methodist Church v. Zoning Hearing Bd. Ridley Park Borough* (*Ridley Park*), 920 A.2d 953, 957-61 (Pa. Commw. Ct. 2007). The court concluded that because "daycare is not a fundamental religious activity of a church," the Zoning Hearing Board erroneously applied RFPA. *Id.* at 960.

Parents' only remaining claim involves the interpretation of a state statute on which there is no Pennsylvania precedent. Because all federal issues have been decided on summary judgment and since Parents' RFPA claim raises a novel and potentially complex issue of State law, we will decline to exercise supplemental jurisdiction over Parents' pendent state law claim. 28 U.S.C. § 1367(c).[33]

V.

For the foregoing reasons, we will affirm the District Court's grant of summary judgment in favor of the school districts on Parents' federal constitutional claims, vacate the District Court's holding regarding the pendent RFPA claim, and remand the case to the District Court with instructions to remand the RFPA claim to state court.

SCIRICA, *Chief Judge*, concurring.

Section 1367(c) provides: "The district courts may decline to exercise supplemental jurisdiction over a claim . . . if (1) the claim raises a novel or complex issue of State law . . . [or] (3) the district court has dismissed all claims over which it has original jurisdiction . . . ." 28 U.S.C. § 1367(c). The

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[33] *Shaffer v. Board 33 of School Directors of Albert Gallatin Area School District*, 730 F.2d 910 (3d Cir. 1984), a pre-section 1367 decision, supports this conclusion. In *Shaffer*, we found that "where the underlying issue of state law is a question of first impression with important implications for public education in Pennsylvania, factors weighing in favor of state court adjudication certainly predominate." *Id.* at 913.

District Court here exercised supplemental jurisdiction over Parents' state law Religious Freedom Protection Act claim. The claim was fully presented to and adjudicated by the District Court. I would decide the issue.

As noted, in order to obtain relief under RFPA, Parents must prove by clear and convincing evidence that their free exercise of religion has been substantially burdened or likely will be substantially burdened. *Id.* § 2404, 2405(f). If Parents satisfy this burden, the school districts are required to prove, by a preponderance of the evidence, that Act 169 furthers a compelling interest and is the least restrictive means of furthering the interest. 71 Pa. Stat. Ann. § 2404(a)–(b). Thus, as a threshold matter, Parents must prove, by clear and convincing evidence, that their free exercise of religion has or will likely be "substantially burdened."

Parents have made conflicting claims as to what conduct or review by the school districts constitutes a substantial burden. In their complaint, Parents challenge all state review of their home education programs.[34] But deposition testimony

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[34] *See, e.g.*, Combs Compl. ¶ 12 ("Mr. and Mrs. Combs' religious beliefs acknowledge that the civil government may require them to educate their children, but, according to their religious belief, the civil government lacks jurisdiction to approve or administratively supervise the education they provide."); Combs Compl. ¶ 14 ("It is a specific tenet of Mr. And Mrs. Combs' religious faith, rooted in their understanding of the Bible, that it would be sinful for them to engage in conduct or expression that would grant control over their children's education to the civil government."); Hankin Compl. ¶ 20 ("It is a specific tent of Mr. and Mrs. Hankin's religious faith, rooted

reveals some variance by Parents on the permissible level of state oversight.[35] Nevertheless, in their District Court briefs, Parents again contended that "placing of authority in any state agency violates their sincerely held religious beliefs" and that "it is a specific tenet of their religious faith that the State lacks the jurisdiction over education and the family that Act 169 asserts." Parents Br. Opp'n to Def.'s Mot. Summ. J. at 9-10, Apr. 14, 2006.[36] At oral argument, however, Parents' counsel again shifted the focus of their claims and appeared to concede that the objectionable portion of Act 169 was not the record keeping, testing, or third party evaluation, but the school districts' independent, "discretionary" review of their children's educational progress. But assuming a proper concession, this possible

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in their understanding of the Bible, that it would be sinful for them to have any association with the public school system.").

[35] *See, e.g.*, Maryalice Newborn Dep. at 49, Aug. 30, 2005 ("Q: What level of state review would be acceptable to you? A: None."); Thomas Hankin Dep. at 55, Sept. 6, 2005, ("I personally believe that if the discretion of the school district were removed, there would be a lot less trouble religiously with my beliefs; that is, if I submitted to the school district a statement that said . . . I am educating my children and this is what I'm teaching them this year.").

[36] *See also* Parents 36 Br. Opp'n to Def.'s Mot. Summ. J. at 10, Apr. 14, 2006 ("Because Plaintiffs believe that *all* education is inherently religious, Caesar has no jurisdiction over it at all."); *id.* at 11 (citing Herbert W. Titus, founding dean of Regent University School of Law, for the proposition that "[b]oth the Establishment and the Free Exercise clauses preclude the civil government from exercising jurisdiction over the education of the people.").

alteration of the claim was not made before the District Court.

I.

As noted, the construction and application of RFPA's fourth definition of "substantially burden" is an issue of first impression. Because this is a matter of Pennsylvania law, "we must predict how the Pennsylvania Supreme Court, if faced with the identical issue, would construe the statute." *Prudential Prop. & Cas. Ins. Co. v. Pendleton*, 858 F.2d 930, 934 (3d Cir. 1988).[37]

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[37] The Commonwealth's 37 rules of statutory construction, codified at 1 Pa. Cons. Stat. §§ 1901–1978, "shall be observed, unless the application of such rules would result in a construction inconsistent with the manifest intent of the General Assembly." *Id.* § 1901. "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." *Id.* § 1921(a).

Words and phrases are construed "according to their common and approved usage," whereas technical words which are defined will be construed according to their peculiar definitions. *Id.* § 1903. "When the words of the statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." *Id.* § 1921(b). The Pennsylvania Supreme Court "has repeatedly recognized that rules of construction, such as consideration of a statute's perceived 'object' or 'purpose,' are to be resorted to only when there is an ambiguity." *Commonwealth v. Taylor*, 841 A.2d 108, 112 (Pa. 2004). However,

> [w]hen the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters: (1) The occasion and necessity for the statute. (2) The circumstances under which it

In construing the meaning of "substantially burden," the District Court relied on the plain language of the statute, the analysis of "substantially burden" in the "context of Free Exercise Clause and similar freedom of religion restoration acts," and the intent of the General Assembly to restore the "traditional (pre-*Smith*) free exercise of religion standards." *Combs*, 468 F. Supp. 2d at 771. As noted, Parents contend the District Court either ignored or misapplied the plain language of the statute and improperly included legislative history and pre- *Smith* decisions in its analysis.

II.

Parents rely exclusively upon the RFPA's fourth definition of "substantially burden" – "an agency action which . . . [c]ompels conduct or expression which violates a specific tenet of a person's religious faith." 71 Pa. Stat. Ann. § 2403. Parents contend they are compelled, under threat of truancy charges, to submit the portfolio of their children's work product to the school districts for discretionary review. Parents describe the act of turning over the portfolio for discretionary review as

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> was enacted. (3) The mischief to be remedied. (4) The object to be attained. (5) The former law, if any, including other statutes upon the same or similar subjects. (6) The consequences of a particular interpretation. (7) The contemporaneous legislative history. (8) Legislative and administrative interpretations of such statute.

1 Pa. Cons. Stat. § 1921(c).

"conduct or expression." They point to the exercise of editorial judgment and creativity on the part of the home education supervisor as evidence of this expression.[38] Moreover, Parents assert a "specific tenet" based upon certain religious beliefs.

First, Parents maintain their faith teaches that "education of their children, not merely the 'religious education,' is 'religion.'" Parents Br. at 64. Parents cite, *inter alia*, *Deuteronomy* 6:5-7 (NIV) ("Love the Lord your God with all your heart and with all your soul and with all your strength. These commandments that I give you today are to be upon your hearts. Impress them on your children. Talk about them when you sit at home and when you walk along the road, when you lie down and when you get up."), *Psalms* 145:4 (NIV) ("One generation will commend your works to another; they will tell of your mighty acts."), *Ephesians* 6:4 (NIV) ("Fathers, do not exasperate your children; instead, bring them up in the training and instruction of the Lord."), and *Proverbs* 22:6 ("Train up a child in the way he should go and when he is old, he will not depart from it."), for the proposition that God has directly called upon them to home educate their children.

Second, Parents contend God has assigned religious matters to the exclusive jurisdiction of the family, citing, *inter alia*, *Luke* 20:25 ("Then render to Caesar the things that are Caesar's, and to God the things that are God's."), *Pslams* 127:3 (NIV) ("Sons are a heritage from the Lord, children a reward

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[38] I assume, without deciding, that Parents' actions are "conduct or expression" within the meaning of the RFPA.

from him."), *Matthew* 7:6 ("Don't give what is holy to unholy people."), 1 *Corinthians* 10:31 ("Whatever you do, do it all for the glory of God."), 2 *Timothy* 2:15 ("Be diligent to present yourself approved to God."), 1 *Thessalonians* 2:4 ("We are not trying to please men but God, who tests our hearts."), and *Acts* 5:29 ("We must obey God rather than men."). Parents contend Act 169 replaces the headship of Christ over the family, and their headship over their children, with the headship of the state over the family, citing, *inter alia*, 1 *Corinthians* 11:3 (NIV) ("Now I want you to realize that the head of every man is Christ, and the head of the woman is man, and the head of Christ is God."), *Ephesians* 5:23 (NIV) ("For the husband is the head of the wife as Christ is the head of the church, his body, of which he is the Savior."), and *Ephesians* 6:1 (NIV) ("Children, obey your parents in the Lord, for this is right.").[39] As a result

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[39] The Previshes also cite the Catechism of the Roman Catholic Church. *See, e.g.*, *Catechism* 2223 ("Parents have the first responsibility for the education of their children. They bear witness to this responsibility first by creating a home where tenderness, forgiveness, respect, fidelity, and disinterested service are the rule. The home is well suited for education in the virtues. This requires an apprenticeship in self-denial, sound judgment, and self-mastery – the preconditions of all true freedom. Parents should teach their children to subordinate the 'material and instinctual dimensions to interior and spiritual ones.'"); *Catechism* 2229 ("As those first responsible for the education of their children, parents have the right to choose a school for them which corresponds to their own convictions. This right is fundamental. As far as possible parents have the duty of choosing schools that will best help them in their task as Christian educators. Public authorities have the duty of guaranteeing this parental right and of ensuring concrete conditions for its exercise.").

of this "specific tenet," Parents assert a sincerely held religious belief that the school districts have no authority to compel reporting or to engage in discretionary review of their home education program.

The term "specific tenet" is not defined in the Religious Freedom Protection Act or 1 Pa. Cons. Stat. § 1991.[40] The Oxford English Dictionary defines "specific" as "precise or exact in respect of fulfilment, conditions, or terms; definite, explicit" and "exactly named or indicated, or capable of being so; precise, particular." 2 Oxford English Dictionary 2949 (Compact ed. 1971); *see also* Merriam-Webster's Dictionary 1132 (9th ed. 1990) (defining "specific" as "sharing or being those properties of something that allow it to be referred to a particular category" or as "free from ambiguity"). "Tenet" is defined as "[a] doctrine, dogma, principle, or opinion, in religion, philosophy, politics or the like, held by a school, sect, party, or person." 2 Oxford English Dictionary 3260 (Compact ed. 1971); *see also* Merriam-Webster's Dictionary 1215 (9th ed.1990) (defining "tenet" as "a principle, belief, or doctrine generally held to be true; especially: one held in common by members of an organization, group, movement, or profession").

In the religious context, the term "specific tenet" is difficult to define.[41] Even though a religious

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[40] Section 1991 defines words and phrases for "any statute finally enacted on or after September 1, 1937."

[41] The words "specific," "specificity," and "particularity" are familiar terms in Pennsylvania and federal procedural law, and in that context, denote a heightened pleading standard as

concept may be stated generally, it may, in the believer's mind, be a specific religious tenet. At one end of the spectrum, specificity may be relatively straightforward and easy to identify because the "specific tenet" is observed as an outward manifestation of a particular religious belief. For example, in *Fraternal Order of Police Newark Lodge No. 12 v. Newark*, 170 F.3d 359 (3d Cir. 71 1999), two Sunni Muslim officers successfully challenged an internal order requiring all police officers to shave their beards. Plaintiffs articulated a religious commandment to grow and wear a beard. *Id.* at 360-61; *see also Deveaux v. Philadelphia*, No. 3103 Feb. Term 2005, 2005 WL 1869666, at *1-2 (Pa. Com. Pl. July 14, 2005) (granting a preliminary injunction preventing the city from suspending a practicing Muslim firefighter without pay for refusing to shave his beard). In *Sherbert v. Verner*, 374 U.S. 398 (1963), a member of the Seventh-day Adventist Church challenged state unemployment compensation rules that conditioned the availability of benefits upon her willingness to work under conditions forbidden by her religion. The Court acknowledged that "the prohibition against Saturday

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opposed to a more general (notice) standard. *See, e.g.*, *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346, 1352 (Pa. 1991) ("Both Rule 1019(b) of the Pennsylvania Rules of Civil Procedure and case law require that fraud be plead with specificity. The appellees' complaint does not rise to the level of specificity that we require." (citation omitted)); *c.f. In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534 (3d Cir. 1999) (noting, in the Private Securities Litigation Reform Act ("PSLRA") fraud context, that the PSLRA "echoes precisely Fed. R. Civ. P. 9(b) and therefore requires plaintiffs to plead 'the who, what, when, where, and how . . . .'" (citation ommitted)).

labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion's interpretation of the Holy Bible." *Id.* at 399 n.1.

Furthermore, religious dietary laws would appear to qualify as specific tenets. In *Williams v. Bitner*, 455 F.3d 186 (3d Cir. 2006), a Muslim inmate assigned to kitchen duty was disciplined for refusing to aid others in the consumption of pork. Citing the Koran ("He has forbidden you . . . the flesh of swine") and Chapter Eleven of Leviticus in the Old Testament, Williams averred that handling and serving pork would violate his religious faith. *Id.* at 187. Our court held that "prison officials must respect and accommodate, when practicable, a Muslim inmate's religious beliefs regarding prohibitions on the handling of pork" and affirmed the denial of qualified immunity. *Id.* at 194. *See also DeHart v. Horn*, 390 F.3d 262, 272-75 (3d Cir. 2004) (discussing a Buddhist prisoner's Religious Land Use and Institutionalized Persons Act claim based upon his request for a special diet).

At the other end of the spectrum are claims similar to Parents'. These claims cite more general and less obviously manifested concepts. This is not to undervalue these tenets which, as revelations, may be fundamental to one's religious beliefs. In these situations, however, it may be difficult to determine whether a litigant's citations to scripture or to general religious concepts articulate a "specific tenet." Also problematic in this analysis are religious tenets that may be viewed as both general and specific. *See, e.g., Exodus* 20:7 ("Thou shalt not take the name of the LORD thy God in vain, for the

LORD will not hold him guiltless that taketh his name in vain."); *Exodus* 20:12 ("Honor thy father and thy mother that thy days may be long upon the land which the LORD thy God giveth thee.").

Furthermore, the RFPA definition of "substantially burden" appears to create some tension between state and federal law. The United States Supreme Court has cautioned against making religious interpretations in the First Amendment context. *See, e.g., Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *id.* at 886-87 ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field."); *Thomas v. Review Bd. Of the Indiana Employment Sec. Div.*, 450 U.S. 707, 715 (1981) ("Courts should not undertake to dissect religious beliefs . . . because [the believer's] beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."); *id.* at 716 ("Courts are not arbiters of scriptural interpretation."). Additionally, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc to 2000cc-5, "does not permit a court to determine whether the belief or practice in question is 'compelled by, or central to, a system of religious belief.'" *Washington v. Klem*, 497 F.3d 272, 277 (3d Cir. 2007) (quoting 42 U.S.C. § 2000cc-5(7)(A)).

Nevertheless, the Pennsylvania General Assembly's statutory definition of "substantially burden" appears to require courts to inquire into, *inter alia*, whether an activity is fundamental to a person's religion or whether a person is compelled to violate a specific tenet of their religious faith. *See* 71 Pa. Stat. Ann. § 2403 (defining substantially burden as "an agency action which . . . [d]enies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion [or c]ompels conduct or expression which violates a specific tenet of a person's religious faith.").[42] Arguably, a violation of a general tenet might substantially burden one's religious faith. But that was not what the Pennsylvania General Assembly proscribed. The statutory language shifts the burden of establishing a compelling interest and least restrictive means to the state actor only after the violation of a specific tenet, which must mean something different from a general tenet. As noted, the dilemma is especially striking because, in the view of the believer, the violation of a general tenet may very well substantially burden one's religious faith.

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[42] As noted, in *Ridley Park* 42 the Pennsylvania Commonwealth Court examined the third definition of "substantially burden" – "denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion" – and concluded that while daycare "aided in carrying out the Church's religious mission, [it] is not a fundamental religious activity of a church." *Ridley Park*, 920 A.2d at 960. "For example, ministering to the sick can flow from a religious mission, but it is not a fundamental religious activity of a church because a hospital may be built to satisfy that mission." *Id.*

Nevertheless, given the normal usage of the term, it is difficult to see that Parents have cited a *specific* tenet that would prohibit reporting requirements and discretionary school district review of their children's educational progress. Instead, they reference general, but nonetheless important, religious tenets, *see, e.g., Luke* 20:25 ("Then render to Caesar the things that are Caesar's, and to God the things that are God's."); 2 *Timothy* 2:15 ("Be diligent to present yourself approved to God."), to assert that local school districts have no authority to conduct a limited review of their children's educational progress. In addition, under RFPA's fourth definition of "substantially burden," a party must establish a nexus between the specific tenet and the compelled violation, a nexus that Parents have not established here.

Furthermore, the inconsistencies in Parents' complaints, depositions, briefs and appellate oral argument suggest the difficulty in identifying a specific tenet (as opposed to a general tenet) and its attendant consequences. In their complaints, briefs to the district court, and some deposition testimony, Parents asserted a "specific tenet" that the state "lacks the jurisdiction" over their children's education, i.e., that no level of state review would be permissible.[43] *See* Parents Br. Opp'n to Def.'s Mot. Summ. J. at 9-10, Apr. 14, 2006. But at oral argument, Parents implied that their asserted "tenet" might allow non-discretionary review of their

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[43] Although it is not entirely clear, I understand Parents' argument to mean that the natural consequence of their asserted specific tenet is that the state has no jurisdiction over homeschooling.

home education programs. *See also* Parents Reply Br. at 8 ("Parents do not contend that the government may not establish any standards to govern home education. Rather, the Parents' core objection . . . is that their religious beliefs forbid them from submitting their religious education of their children to the discretionary review of a governmental official."). Yet it is problematic whether this interpretation of "non-discretionary" review would amount to any review at all.

Based upon the plain language of the RFPA, Parents have failed to prove by clear and convincing evidence that they have been compelled or will likely be compelled to violate a specific tenet of their religious faith. Accordingly, Parents cannot sustain their cause of action under the Pennsylvania RFPA.

III.

Even finding the term "specific tenet" in the RFPA to be ambiguous, the decision would be the same. As noted, the purpose of statutory interpretation "is to ascertain and effectuate the intention of the General Assembly." 1 Pa. Cons. Stat. § 1921(a). Under section 1921(c), when a statute's words are ambiguous, the intention of the General Assembly "may be ascertained" by considering an array of factors.[44]

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[44] As noted, those factors include, but are not limited to: "(1) The occasion and necessity for the statute. (2) The circumstances under which it was enacted. (3) The mischief to be remedied. (4) The object to be attained. (5) The former law, if any, including other statutes upon the same or similar subjects. (6) The consequences of a particular interpretation. (7) The

The historical background and legislative history of Pennsylvania's RFPA places it in context and assists in interpreting the statute. Much of this depends on the development of federal First Amendment jurisprudence and its influence on Pennsylvania law. Prior to 1990, legislation and government regulation burdening the free exercise of religion was subject to the *Sherbert* test. *See Sherbert v. Verner*, 374 U.S. 398 (1963). Under this rule, if the government substantially burdened a person's constitutional free exercise rights, then it was required to justify the burden with a compelling state interest and with proof that the least restrictive means was employed. *Id.* at 402-04. *See also Jimmy Swaggart Ministries v. Bd. of Equalization of California.*, 493 U.S. 378, 384-85 (1990) ("Our cases have established that 'the free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'" (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989))).

In 1990, the Supreme Court held that the Free Exercise Clause did not prohibit enforcement of a neutral law of general applicability supported by a rational basis. *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 890 (1990). The Court concluded that the state could deny unemployment benefits due to work-related misconduct based upon an employee's religiously

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contemporaneous legislative history. (8) Legislative and administrative interpretations of such statute." 1 Pa. Cons. Stat. § 1921(c).

motivated ingestion and use of a drug; specifically, in that case, the ceremonial use of peyote. *Id.* Declining to apply the *Sherbert* balancing test, the Court noted that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)). Thus, *Smith* and its progeny "establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993) (citing *Smith*).

The *Smith* Court noted that religious exemptions, while not constitutionally required, could be created through the political process. *Smith*, 494 U.S. at 890 (citing several state statutes making "an exception to their drug laws for sacramental peyote use"). In 1993, Congress accepted the Court's invitation by enacting the Religious Freedom Restoration Act ("RFRA"), 107 Stat. 1488, 42 U.S.C. §§ 2000bb to 2000bb-4 (amended 2000). Congress sought to restore the compelling interest test articulated in *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), "and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb. Applicable to "all Federal and State law," Pub. L. No. 103-141, § 6, 107 Stat. 1488, 1489 (1993), RFRA

prohibited both the federal and state governments[45] from "substantially burden[ing] a person's exercise of religion" except through the least restrictive means of furthering a compelling interest. 42 U.S.C. § 2000bb-1. In 1997, the Supreme Court struck down RFRA as applied to the states[46] because RFRA exceeded the scope of Congress' enforcement power under section 5 of the Fourteenth Amendment. *Boerne v. P.F. Flores*, 521 U.S. 507, 536 (1997). RFRA lacked a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520, 529-36.

In part a reaction to *City of Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5, which addresses only land use regulations and the religious rights of institutionalized persons. *Id.* §§ 2000cc, 2000cc-1. RLUIPA prohibits both state and federal governments from imposing a

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[45] At the time of enactment in 1993, "Government" was defined as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." Pub. L. No. 103-141, § 5, 107 Stat. 1488, 1489 (1993). As amended, "Government" is defined as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." 42 U.S.C. § 2000bb-2(1). "Covered entity means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States." *Id.* § 2000bb-2(2).

[46] RFRA continues to be enforced against the federal government. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (applying RFRA to regulations by the federal government under the Controlled Substances Act)

"substantial burden" on the religious exercise of an institutionalized person unless it is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc-1. Also, several states in addition to Pennsylvania passed their own religious freedom restoration or protection legislation.[47]

Although there are differences among the various federal and state religious protection statutes, most contain, at their core, the same fundamental structure and purpose. They recognize that neutral laws of general applicability may burden religious exercise as significantly as laws intended to interfere with religious exercise. The federal statutes, Pennsylvania's RFPA, and a majority of the state statutes also acknowledge the government need not justify every action having some effect on religious exercise. Under those statutes, only *substantial* burdens trigger heightened scrutiny.[48] RFPA's four definitions of

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[47] *See* Ariz. Rev. Stat. Ann. §§ 41-1493; Conn. Gen. Stat. § 52-571b; Fla. Stat. § 761.01 to 761.05; Idaho Code Ann. §§ 73-401 to 73-404; 775 Ill. Comp. Stat. 35/1 to 35/99; Mo. Ann. Stat. §§ 1.302 & 1.307; N.M. Stat. §§ 28-22-1 to 28-22-5; Okla. Stat. tit. 51 §§ 251 to 258; R.I. Gen. Laws §§ 42-80.1-1 to 42- 80.1-4; S.C. Code Ann. §§ 1-32-10 to 1-32-60; Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001 to 110.012; Va. Code Ann. §§ 57-1 to 57-2.02; Utah Code Ann. §§ 63L-5-101 to 63L-5-403; *see also* Ala. Const. Art I, § 3.01. The Pennsylvania RFPA became effective December 9, 2002. Missouri, Utah and Virginia passed legislation after 2002.

[48] Alabama and Connecticut do not modify "burden." Ala. Const. Art I, § 3.01 ("Government shall not burden a person's freedom of religion . . . ."); Conn. Gen. Stat. § 52-571b ("The state . . . shall not burden a person's exercise of religion .

"substantially burden" emphasize the importance of this threshold. *See* 71 Pa. Stat. Ann. § 2403 ("*significantly* constrains or inhibits"; "*significantly* curtails"; "denies . . . a reasonable opportunity to engage in activities . . . *fundamental* to the person's religion"; "violates a *specific tenet* of a person's religious faith.") (emphasis added).

In our modern regulatory state, virtually all legislation (including neutral laws of general applicability) imposes an incidental burden at some level by placing indirect costs on an individual's activity. Recognizing this, legislatures have sought a balance between protecting free exercise of religion and preserving an effective police power. The federal government, Pennsylvania, and several other states have identified a substantiality threshold as the tipping point for requiring heightened justifications for governmental action.[49] Furthermore, by requiring

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. . ."). Missouri, New Mexico, and Rhode Island prohibit the government from "restrict[ing] a person's free exercise of religion." Mo. Ann. Stat. § 1.302; N.M. Stat. §§ 28-22-3; R.I. Gen. Laws §§ 42-80.1-3.

[49] To illustrate, for the purposes of RLUIPA, we recognize that a "substantial burden" exists where:

> 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.

proof of a "substantial burden" by clear and convincing evidence, Pennsylvania appears to have set a higher threshold than other religious restoration statutes. *Compare* 71 Pa. Stat. Ann. §§ 2404, 2405 (requiring "clear and convincing evidence" of substantial burden), *with* 42 U.S.C. § 2000cc-2(b) ("plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice . . . substantially burdens the plaintiff's exercise of religion"), *Warner*, 887 So.2d at 1034 ("[T]he plaintiff bears the initial burden of showing that a regulation constitutes a substantial burden . . . ."), *Diggs v. Snyder*, 775 N.E.2d 40, 45 (Ill. App. Ct. 2002) (requiring, under the Illinois Religious Freedom Restoration Act, plaintiff "to make a threshold showing" of substantial burden).

As noted, Parents have not cited a specific tenet that would prevent adherence to the reporting requirements or prohibit discretionary School District review of their children's educational progress. Instead, they reference general, but

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Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007). Under the Florida Religious Freedom Restoration Act, "a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." *Warner v. Boca Raton*, 887 So.2d 1023, 1033 (Fla. 2004). "A plaintiff who claims that a governmental regulation constitutes a substantial burden must 'prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates.'" *Id.* at 1035 (citations omitted).

important, religious tenets to support their claim that local school districts have no authority to conduct limited review of their home education programs. Such a broad interpretation of the term "specific tenet" would appear to read "specific" out of the statute.

The occasion, necessity, and purpose of the RFPA do not support a finding, by clear and convincing evidence, that Parents are compelled or will likely be compelled to violate a specific tenet of their religious faith. Accordingly, Parents cannot prevail on their cause of action under the Pennsylvania RFPA.

ENTERED September 16, 2008

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

MR. DARRELL COMBS, and
MRS. KATHLEEN COMBS,
Plaintiffs,

v.

HOMER CENTER SCHOOL DISTRICT, and
JOSEPH F. MARCOLINE,
in his official capacity as
Superintendent of Homer-City School district,
Defendants.

04cv1599 LEAD
Consolidated for purpose of pretrial
Proceedings with 04-1670, 04-1932,
04-1936, 05-70(E), 05-203(J)

ELECTRONICALLY FILED

DR. THOMAS PREVISH AND
TIMARI PREVISH,
Plaintiff, 04cv1670

v.

NORWIN SCHOOL DISTRICT, and
RICHARD WATSON,
in his official capacity as
Superintendent of Norwin School District,
Defendents.

DR. MARK NEWBORN, and
MRS. MARY ALICE NEWBORN
Plaintiffs, 04cv1932

v.

FRANKLIN REGIONAL SCHOOL
DISTRICT, ET AL., and
STEPHEN VAK,
in his official capacity as
Superintendent of Franklin Regional School District,
Defendants.

MR. THOMAS HANKIN, and
MRS. BABETTE HANKIN,
Plaintiffs, 04cv1936

v.

BRISTOL TOWNSHIP SCHOOL DISTRICT, and
REGINA CESARIO,
in her official capacity as
Superintendent of Bristol Township School District,
Defendants.

MR. GOUGLAS NELSON and
MRS. SHARI NELSON,
Plaintiffs, 05cv0070
(Erie)

v.

TITUSVILLE AREA SCHOOL DISTRICT, and
JOHN D. REAGLE, in his official
capacity as Acting Superintendent of
Titusville Area School District,
Defendant.

REV. STEVEN WEBER AND
MRS. MEG WEBER,
Plaintiffs, 05cv203 (J)

v.

DUBOIS AREA SCHOOL DISTRICT, and
SHARON KIRK,
in her official capacity as
Superintendent of Dubois Area School District,
Defendants.

ORDER OF COURT

AND NOW, this 16th day of September, 2008, upon the Joint Motion for Stay of Remand, it is hereby ORDERED that the Parties' Joint Motion is GRANTED, and (1) since the mandate has been received from the Court of Appeals on these consolidated cases, these cases are opened; (2) based up on said motion (Doc. No. 1 17), these consolidated cases are STAYED pending final disposition of the Plaintiffs' Petition for Certiorari to the United States Supreme Court, and (3) pending the granting of a Motion to Dissolve the Stay, these consolidated cases are again administratively closed.

/s/ Arthur B. Schwab
Arthur J. Schwab
United States District Judge

ENTERED May 25, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELECTRONICALLY FILED

04cv1599 LEAD
Consolidated for Purpose of Pretrial Proceedings with 04-1670, 04-1932, 04-1936, 05-70(E), 05-203(J)

MR. DARRELL COMBS, and
MRS. KATHLEEN COMBS,
Plaintiffs,

v.

HOMER CENTER SCHOOL DISTRICT, and
JOSEPH F. MARCOLINE, in his official capacity as Superintendent of Homer-City School District,
Defendants.

DR. THOMAS PREVISH AND
TIMARI PREVISH,
Plaintiff, 04cv1670

v.

NORWIN SCHOOL DISTRICT, and
RICHARD WATSON, in his official capacity as Superintendent of Norwin School District,
Defendants.

DR. MARK NEWBORN, and
MRS. MARY ALICE NEWBORN,
Plaintiffs, 04cv1932

v.

FRANKLIN REGIONAL SCHOOL
DISTRICT, and
STEPHEN VAK, in his official capacity as
Superintendent of Franklin Regional School District,
Defendants.

MR. THOMAS HANKIN, and
MRS. BABETTE HANKIN,
Plaintiffs, 04cv1936

v.

BRISTOL TOWNSHIP SCHOOL DISTRICT, and
REGINA CESARIO, in her official capacity as
Superintendent of Bristol Township School District,
Defendants.

MR. DOUGLAS NELSON and
MRS. SHARI NELSON,
Plaintiffs, 05cv0070 (Erie)

v.

TITUSVILLE AREA SCHOOL DISTRICT, and JOHN D. REAGLE, in his official capacity as Acting Superintendent of Titusville Area School District,

Defendant.

REV. STEVEN WEBER AND MRS. MEG WEBER,

Plaintiffs, 05cv203 (Johnstown)

v.

DUBOIS AREA SCHOOL DISTRICT, and SHARON KIRK, in her official capacity as Superintendent of Dubois Area School District,

Defendants.

MEMORANDUM OPINION

May 25, 2006

I. Introduction

A. General Background

The Commonwealth of Pennsylvania's education system, enacted by its General Assembly (as opposed to the Pennsylvania Department of Education ("PDE") or local school boards or administrators), permits parents and guardians to satisfy Pennsylvania's compulsory education laws through "home education programs," subject to minimum days of attendance and hours of

instruction in certain specific courses (e.g., language, geography, literature, history) and review by the respective school districts of logs and educational materials compiled by the supervisors of the home education programs for compliance with the required courses and minimum days and hours of instruction, but not of educational content, textbooks, curriculum or instructional materials.

Parents who home school their children based on their sincerely held religious beliefs have sued their respective school districts and superintendents in several state and federal courts in the Commonwealth of Pennsylvania, seeking a declaratory judgment and equitable relief from the enforcement of Pennsylvania's Compulsory Attendance Law through truancy prosecutions on the grounds that Pennsylvania's statute permitting "home education programs" violates the Pennsylvania Religious Freedom Protection Act, the Free Exercise, Establishment and Free Speech Clauses of the First Amendment to the Constitution of the United States, and several aspects of the Due Process Clause of Fourteenth Amendment to the Constitution of the United States, both "on its face" and "as applied."

B. Procedural Background

On December 8, 2005, this Court entered an opinion and order (Document No. 84) denying the motion for summary judgment filed by Plaintiffs (parents who home school their children for religious reasons) addressed to their "facial" constitutional and statutory challenges to Defendant school

districts' various home schooling programs implementing Pennsylvania's Home Schooling Act, Act 169, but left open the possibility that Plaintiffs "may be able to demonstrate that, as applied in practice, one or more of the Defendant school districts or superintendents applies Act 169 in such a way as to restrict or infringe upon their religious practice or exercise." *Combs v. Homer Center Sch. Dist.*, 2005 WL 3338885, at *29 (W.D.PA. 2005).

At the next status conference, on January 4, 2006, Plaintiffs could not identify any significant factual disputes regarding their "as applied" challenges to Act 169, but were not prepared, however, to concede that there were no genuine issues of material fact remaining regarding their "as applied" challenges. Accordingly, the Court directed a second round of summary judgment motions and briefs, with Defendant school districts as the movants, addressed to the parents' remaining "as applied" challenges to the various home schooling programs. Defendants have filed their consolidated motion for summary judgment and concise statement of material facts (Documents Nos. 100, 101), Plaintiffs filed their response and memorandum of law in opposition thereto (Documents Nos. 103, 104), and Defendants have filed their reply brief (Document No. 108). The matter is now ripe for disposition. This memorandum opinion will set forth the Court's reasoning and disposition of both the "facial" and the "as applied" challenges to Act 169.

Resolution of the pending motion for summary judgment requires careful consideration and

balancing of often competing personal, societal and governmental interests — the rights of parents and guardians to direct the education and upbringing of their children and the constitutional and statutory obligation of the Commonwealth to provide for and ensure the adequate education of its children citizens — and constitutional principles that are basic to our Nation's concept of ordered liberty and democracy.

II. The Pennsylvania Constitutional and Statutory Framework

A. Education in American History in General, and in the Commonwealth of Pennsylvania in Particular

1. American History

An educated citizenry has been recognized as critical to the success and well-being of the Nation and its people from the time of its creation. Founding fathers, including George Washington, John Adams, Thomas Jefferson and, in the Commonwealth of Pennsylvania, William Penn, championed the view that the government has an overarching responsibility to create and to regulate a system of public education.

In his farewell address in 1796, America's first president, George Washington, addressed the issue of public education provided by the government. "Promote then, as an object of primary importance, institutions for the general diffusion of knowledge. ... In proportion as the structure of a government gives

force to public opinion, it is essential that public opinion should be enlightened."[1] John Adams agreed that the government was obligated to educate its citizens. In 1780, Adams engrafted that principle into the Massachusetts' Constitution, which stated: "[I]t shall be the duty of the legislatures and magistrates, in all future periods of the Commonwealth, to cherish the interests of ... public school and grammar schools in the towns."[2]

And, serving in Virginia's state legislature, Thomas Jefferson proposed legislation in the fall of 1778 to create a public school system in Virginia. Jefferson titled this measure A Bill for the More General Diffusion of Knowledge.[3] "For Thomas Jefferson, public education was the key to preserving republican government."[4] Jefferson believed every citizen should have access to public education because the "most effectual means of preventing [public corruption] would be, to illuminate, as far as practicable, the minds of the people at large."[5]

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[1] The Avalon Project at Yale Law School, Washington's Farewell Address 1796, www.yale.edu/lawweb/avalon/washing.htm.

[2] Dave Wieneke, Education Time Line: 400 Years in Education, Mass. Gov. interactive website, www.mass.gov/statehouse/1700.htm.

[3] Thomas Jefferson Exhibits, www.loc.gov/exhibits/jefferson/jeffrep/html., United States Library of Congress website.

[4] Id.

[5] Id.

The Massachusetts Bay Colony was the first American colony to pass a compulsory education law. In 1642, Massachusetts required parents to see that their children received an education, and five years later, the legislature passed a law which established public schools in some towns, and provided for the appointment of teachers and collection of taxes to pay for the education of children.[6] Connecticut was the next colony to pass a public school law in 1650, requiring all "masters of families" to educate their children and servants.[7]

2. Pennsylvania History

Before any of these notables had placed their imprimaturs on public education as a foundation of good government and a robust Nation, William Penn had advocated for a system of public schools in Pennsylvania,[8] as did other prominent leaders of the Commonwealth.[9] In 1681, Penn was granted the

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[6] Kern Alexander and M. David Alexander, American Public School Law, 22 (1998).

[7] Id.

[8] The Avalon Project at Yale Law School, Frame of Government of Pennsylvania, May 5, 1682, www.yale.edu/lawweb/avalon/states/pa04.htm. See generally Louise Gilchrise Walsh and Matthew John Walsh, History and Organization of Education in Pennsylvania, 20-21, 40-45, 59(1928).

[9] Benjamin Franklin and Benjamin Rush, for example. James Pyle Wichersham, A History of Education in Pennsylvania Private and Public, Elementary and Higher, 58 (1886) (on Franklin's advocacy for public education); Alyn Brodsky, Benjamin Rush Patriot and Physician, 296 (2004)

colony by the King of England. He drafted a Frame of Government for the new Commonwealth, which included a provision for public education, stating: "Twelfth. That the Governors and Provincial Council shall erect and order all Public Schools, and encourage and reward authors of useful sciences and laudable inventions in the said Province."[10]

At Penn's urging, in 1682 the First General Assembly of Pennsylvania created the "Great Law" which included a provision for the creation of schools across Pennsylvania.[11] Then, at the Second General Assembly in 1683, stronger public school legislation was passed under Penn's leadership. In Chapter CXII, this legislation stated:

> And to the end that poor as well as rich man be instructed in good and commendable learning, which is to be preferred before wealth, Be it enacted,... [t]hat all persons in this Province and Territories thereof, having children, and all the guardians and trustees of orphans, shall cause such to be instructed in reading and writing . . . , and that then they be taught some

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(Rush wrote an article in 1787 for the Philadelphia Independent Gazette entitled, "To the Citizens of Philadelphia: A Plan for Free Schools," which called for the creation of schools for all children no matter their age, social status, or religious background).

[10] Wichersham, at 33.

[11] Id., at 38.

> useful trade or skill, that the poor may work to live, and the rich if they become poor may not want: of which every County court shall take care. And in case such parents, guardian, or overseers shall be found deficient in this respect, every such parent, guardian, or overseer shall pay for ever such child, five pounds, except there should appear an incapacity in body or understanding to hinder it.[12]

In 1776, the Commonwealth of Pennsylvania passed a provisional state constitution which included the following provision for public education: "A school or schools shall be established in each county by the legislature for the convenient instruction of youth, with such salaries to the masters paid by the public as may enable them to instruct youth at low prices; and all useful learning shall be duly encouraged and promoted in one or more Universities."[13] In one form or another, provisions for public education were set forth in the various state constitutions, culminating in the formulation contained in the Pennsylvania Constitution of 1874, to wit: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years shall be educated, and shall appropriate at least one million dollars each year for that purpose." Pa. Const. of 1874, Art. X, § 1.

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[12] Id., at 39.

[13] Id., at 256.

As amended in 1967, this proviso now reads: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const., Art. III, § 14.

The Pennsylvania Constitution of 1790 was the basis for the Free Public School Act of 1834 which is the underpinning for today's system of schools in the Commonwealth. 22 Pa. Code, Chap. 4, Appx. C, Academic Standards for Civics and Government, XIV. "In meeting its responsibility, the General Assembly has established a comprehensive legislative scheme governing the operation and administration of public education." Pennsylvania Fed'n of Teachers v. Sch. Dist. of Phila., 506 Pa. 196, 484 A.2d 751, 753 (1984).

The structure of Pennsylvania's public school system was summarized by the United States Court of Appeals for the Third Circuit recently in Parents United For Better Schools, Inc. v. Sch. Dist. of Philadelphia Bd. of Educ., 148 F.3d 260, 262 n.1 (3d Cir. 1998):

> The organization of [Pennsylvania's] public school system is controlled by the Public School Code of 1949 (School Code)[24 Pa. Stat. Ann. §§ 1-101--27-2702 (West 1992)]." Philadelphia Fed'n of Teachers, Local No. 3 v. Board of Educ. of the Sch. Dist. of Phila., 51 Pa.Cmwlth. 296, 414 A.2d 424, 426 (1980) (citation omitted). "School Districts act as agencies of the

> state legislature in administering the educational program within the district." Chambersburg Area Sch. Dist. v. Pennsylvania Labor Relations Bd., 60 Pa.Cmwlth. 29, 430 A.2d 740, 743 (1981) (citation omitted), appeal dismissed, 498 Pa. 366, 446 A.2d 603 (1982). See also Barth v. School Dist. of Phila., 393 Pa. 557, 143 A.2d 909, 912 (1958) ("the School District of Philadelphia is an agent or creature of the Legislature"); Kaufman v. Central Susquehanna Intermediate Unit No. 16, 144 Pa.Cmwlth. 163, 601 A.2d 412, 414 (1991) ("The legislature has established that each school district and intermediate unit shall have, inter alia, a board of directors and has set forth the powers and duties of each") (citation omitted).

The following laws were enacted to implement Pennsylvania's constitutional mandate to provide a thorough and efficient system of public education to serve the needs of the citizens of the Commonwealth. Pa. Const., Art. III, § 14.

B. Pennsylvania Compulsory Education Law and Four Legislative Educational Options

The Commonwealth of Pennsylvania requires every child of compulsory school age having legal residence in Pennsylvania "to attend a day school in which the subjects and activities prescribed by the

standards of the State Board of Education are taught in the English language." 24 Pa. Stat. Ann. §13-1327(a). Compulsory school age is defined by the Pennsylvania Administrative Code as "the period of a child's life from the time the child enters school as a beginner which may be no later than at the age of eight (8) years, until the age of seventeen (17) or graduation from a high school, whichever occurs first." 22 Pa. Code §11.13 (2005).

The Pennsylvania legislature currently permits four alternative categories or types of education that may satisfy the Compulsory School Law: (1) public schools, with certain trade school options, 24 Pa. Stat. Ann. §13-1327(a); (2) non-public, licensed private academic schools, 24 Pa. Stat. Ann. §13-1327(a); (3) schools operated by bona fide churches or other religious bodies, 24 Pa. Stat. Ann. §13-1327(b); and (4) "home education programs," 24 Pa. Stat. Ann. §13-1327.1.

First, parents and guardians may fulfill the compulsory attendance requirements by sending their children to public schools. In lieu of such attendance, any child who is fifteen years of age may enroll as a day student in a private trade school or in a private business school licensed by the Pennsylvania Department of Education provided he or she obtains the approval of the district superintendent and Secretary of Education. 24 Pa. Stat. Ann. §13-1327(a). Similarly, any child sixteen years of age may enroll as a day student in a private trade school or in a private business provided he or she obtains the approval of the district superintendent. 24 Pa. Stat. Ann. § 13-1327(a).

Thus, even though a child may opt to attend a private trade or business school, every

> parent, guardian, or other person having control or charge of any child or children of compulsory school age is required to send such child or children to a day school in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language.

24 Pa. Stat. Ann. §13-1327(a).

The second option enacted to ensure "appropriate education" of the children of the Commonwealth is private schools. The certificate of any principal or teacher of a private school, or of any institution for the education of children, "in which the subjects and activities prescribed" by the State Board of Education are taught in the English language, must set forth that the work of said school is in compliance with the provisions of the Compulsory Attendance Law. 24 Pa. Stat. Ann. §13-1327(a). With respect to instruction in the English language, instruction by a properly qualified private tutor shall be considered as complying with the Compulsory Attendance Law. 24 Pa. Stat. Ann. § 13-1327(a). A properly qualified private tutor is defined as "any person who is certified by the Commonwealth of Pennsylvania to teach in the public schools of Pennsylvania." 24 Pa. Stat. Ann. §13-1327(a).

The third alternative permits education at parochial and other religious affiliated schools run by bona fide churches and other religious bodies. The principal of each such school must submit a notarized affidavit to the Pennsylvania Department of Education, stating that the mandated subject matter is offered in the English language and that such school is otherwise in compliance with the provisions of the Compulsory Attendance Law. 24 Pa. Stat. Ann. §13-1327(b). Thus,

> a school operated by a bona fide church or other religion body and the parent, guardian or other person having control or charge of any such child or children of compulsory school age shall be deemed to have meet the requirements of this section if that school provides a minimum of one hundred eight (180) days of instruction or nine hundred (900) hours of instruction per year of instruction at the secondary level.

24 Pa. Stat. Ann. §13-1327(b).

Furthermore, a school operated by a bona fide church or religious body must provide instruction in the following subjects at the elementary level:

> English, to include spelling, reading, and writing; arithmetic; science; geography; history of the United States and Pennsylvania; civic; safety education, including regular and continuous instruction in the dangers

> and prevention of fires; health and physiology; physical education; music; and art.

24 Pa. Stat. Ann. §13-1327(b)(1).

And at the secondary level, such schools must provide instruction in:

> English, to include language, literature, speech and composition; science, to include biology and chemistry; geography; social studies, to include civics, economics, world history, history of the United States and Pennsylvania; a foreign language; mathematics, to include general mathematics and statistics, algebra and geometry; music; physical education; health and physiology; and safety education, including regular and continuous instruction in the dangers and prevention of fires.

24 Pa. Stat. Ann. §13-1327(b)(2).

Although the subject areas to be taught in schools operated by a bona fide church or religious body are prescribed by statute, it is "the policy of the Commonwealth to preserve the primary right and the obligation of the parent or parents, or person or persons in loco parentis to a child, to choose the education and training for such child." 24 Pa. Stat. Ann. §13-1327(b). Accordingly, nothing contained in the Compulsory Attendance Law "shall empower the

Commonwealth, any of its officers, agencies or subdivisions to approve the course content, faculty, staff or disciplinary requirements of any religious school referred to in this section without the consent of said school." Id.

C. Act 169 of 1988 - Pennsylvania Home Schooling Act

The Pennsylvania legislature recognized and permitted the fourth alternative in 1988 - Pennsylvania's Home Schooling Act, Act 169 of 1988, P.L. 1321, No. 169, December 1, 1988, 24 Pa. Stat. Ann. §13-1327.1. Act 169 provides that instruction to children of compulsory school age in a "home education program" satisfies Compulsory Attendance Law. 24 Pa. Stat. Ann. §13-1327.1(d). Act 169 requires the same number of days and hours of instruction, and the same subject matters of instruction as required by a school operated by a bona fide church or religious body. 24 Pa. Stat. Ann. §13-1327.1(c)(1)(2). To begin a home education program, the parent or guardian of the child must file a notarized affidavit prior to the commencement of the home education program, and annually thereafter on August 1, with the superintendent of the school district of residence. 24 Pa. Stat. Ann. § 13-1327. 1(b)(1). This affidavit must set forth:

> [T]he name of supervisor of the home education program who shall be responsible for the provision of instruction; the name and age of each child ...; the address and telephone number of the ... site; that such subjects

> as required by law are offered in the English language, including an outline of proposed education objectives by subject area.

24 Pa. Stat. Ann. §13-1327.1.

The outline of proposed education objectives cannot be utilized by the district superintendent in determining whether the home education program is in compliance. 24 Pa. Stat. Ann. §13-1327.1(b)(1). However, the superintendent is charged with ensuring that "appropriate education" is taking place; "appropriate education" is "a program consisting of instruction in the required subjects for the time required in this act and in which the student demonstrates sustained progress in the overall program." 24 Pa. Stat. Ann. §13-1327.1 (a).

In order to ensure that "appropriate education" is occurring, the supervisor of the home education program must submit to the district superintendent a portfolio of records and materials, as follows:

> (1) A portfolio of records and materials. The portfolio shall consist of a log, made contemporaneously with the instruction, which designates by title the reading materials used, samples of any writings, worksheets, workbooks or creative materials used or developed by the student and in grades three, five and eight results of nationally normed standardized

achievement tests in reading/language arts and mathematics or the results of Statewide tests administered in these grade levels. The department shall establish a list . . . of nationally normed standardized tests from which the supervisor . . . shall select. . . if the supervisor does not choose the Statewide tests. At the discretion of the supervisor, the portfolio may include the results of nationally normed standardized achievement tests for other subject areas or grade levels. The supervisor shall ensure that the nationally normed standardized tests or the Statewide tests shall not be administered by the child's parent or guardian.

* * *

(2) An annual written evaluation of the student's educational progress as determined by a licensed clinical or school psychologist or a teacher certified by the Commonwealth or by a [qualified] nonpublic school teacher or administrator. . . . The evaluation shall also be based on an interview of the child and a review of the portfolio required in clause (1) and shall certify whether or not an appropriate education is occurring. At the request of the supervisor, persons with other qualifications may conduct the

> evaluation with the prior consent of the district of residence superintendent. In no event shall the evaluator be the supervisor or their spouse.

24 Pa. Stat. Ann. § 13-1327.1(e)(1)(2).

If at any time during the school year, the district superintendent has a reasonable belief that appropriate education may not be occurring in a home education program, the superintendent may require documentation pertaining to the portfolio of records and materials to be submitted. 24 Pa. Stat. Ann. § 13-1327.1(h). After reviewing the submitted documentation, if the district superintendent believes that appropriate education is not taking place, either during or at the conclusion of the school year, he or she shall notify the supervisor of the home education program by certified mail, stating such belief and specifying the aspects of the documentation deemed inadequate. 24 Pa. Stat. Ann. §13-1327.1(i). The supervisor of the home education program shall then have twenty (20) days to submit additional documentation demonstrating that appropriate education is occurring. 24 Pa. Stat. Ann. § 13-1327.1(j). If this additional documentation is not forwarded to the district superintendent, the home education program will be declared out of compliance, and as a consequence, the child must be "enrolled in the public school district of residence or a nonpublic school or a licensed private academic school," and the supervisor or spouse of the supervisor shall not be eligible to supervise a home education program for that child for twelve months. 24 Pa. Stat. Ann. § 13-1327.1(j).

If additional documentation is submitted and the district superintendent still determines that appropriate home education is not occurring, he must notify the supervisor of the home education program and the board of school directors must then provide for a "proper hearing by a duly qualified and impartial hearing examiner within thirty days." 24 Pa. Stat. Ann. §13-1327.1(k). The hearing examiner "shall not be an officer, employee or agent of the PDE or of the school district or intermediate unit of residence of the child in the home education program." 24 Pa. Stat. Ann. §13-1327.1(a). If the hearing examiner "finds that the documentation does not indicate that appropriate education is taking place in the home education program, the home education program for the child shall be out of compliance with the requirements of this section and section 1327, and the student shall be promptly enrolled in the public school district of residence or a nonpublic school or a licensed private academic school." 24 Pa. Stat. Ann. §13-1327.1(k). Either the supervisor of the program or the superintendent for the school district may appeal the decision of the hearing examiner to the Secretary of Education (the executive branch) or to the Commonwealth Court of Pennsylvania (the judicial branch). Id.

D. Pennsylvania Administrative Code and Protections of Religious Beliefs

The Pennsylvania Department of Education, headed by the Secretary of Education, is charged by the General Assembly with developing rules and regulations to carry out its legislative enactments as set forth in the Pennsylvania School Code. Act of

July 23, 1969, P.L. 181, § 1, 71 Pa. Stat. Ann. §§1037, 1038; Act of June 16, 1994, P.L. 319, No. 49, § 9, 64 Pa. Stat. Ann. §468. The Administrative Code provides the following regulations that are pertinent to compulsory education and home education programs.

The PDE explains that public education "prepares students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens." 22 Pa. Code §4.11(b). Thus, public education is intended to provide opportunities for students to:

> (1) Acquire knowledge and skills. (2) Develop integrity. (3) Process information. (4) Think critically. (5) Work independently. (6) Collaborate with others. [and] (7) Adapt to change.

22 Pa. Code §4.11(c).

Academic standards "describe the knowledge and skills which students will be expected to demonstrate before graduating from a public school," and are set forth in section 4.12, 22 Pa. Code §4.12, while "assessment in public education" is designed to determine student attainment of state and local academic standards. 22 Pa. Code §4.11(d-e). To that end, public schools "provide instruction throughout the curriculum so that students may develop

knowledge and skills in the following areas: (1) Reading, writing, speaking and listening; (2) Mathematics; (3) Science and technology; (4) Environment and ecology; (5) Social studies (civics and government, geography, economics and history); (6) Arts and humanities; (7) Career education and work; (8) Health, safety and physical education; (9) Family and consumer science; and (10) World languages. 22 Pa. Code §4.11(g)(1-10). Notably, religious instruction and training is omitted from the statutory and administrative objectives and curriculum.

The Code also defines "Planned instruction" as consisting of "at least the following elements: (1) Objectives of a planned course, instructional unit or interdisciplinary studies to be achieved by all students; (2) Content, including materials and activities, and estimated instructional time to be devoted to achieving the academic standards. Courses, instructional units or interdisciplinary studies of varying lengths of time maybe taught; (3) The relationship between the objectives of a planned course, instructional unit or interdisciplinary studies and academic standards specified under § 4.12 and to those determined in the school district's (including charter schools) or AVTS's strategic plan under § 4.13; and (4) Procedures for measurement of the objectives of a planned course, instructional unit or interdisciplinary studies." 22 Pa. Code §4.11(h).

"Students of compulsory school age participating in a home education program are subject to sections 1327(d) and 1327.1 of the Public School Code of 1949 [24 Pa. Stat. Ann. §§ 13-1327(d)

and 1327.1]." The Code provides that school district approval is not required to commence home education programs. 22 Pa. Code § 11.31(a). For purposes of the Pennsylvania State Higher Education Grant Program, "an approved secondary school shall also include any home education program that is accredited by any home schooling accreditation agency approved by the Department of Education. If the home education program lacks the requisite accreditation, certification by the appropriate local school official attesting that the home education program is in compliance with Section 1327.1 of the Public School Code of 1949 [24 Pa. Stat. Ann. §13-1327.1] shall be submitted to the Agency by the appropriate local school official." 22 Pa. Code §121.21(c).

The Pennsylvania Administrative Code mandates that school districts adopt policies that preserve certain religious rights for parents and guardians of children of compulsory school age. First, children shall be "excused from specific instruction which conflicts with the religious beliefs of their parents upon receipt of a written request to the school district." 22 Pa. Code. §4.4(d)(3). Second, if "upon inspection of State assessments parents or guardians find the assessments in conflict with their religious belief and wish their student be excused from the assessment, the right of the parents or guardians will not be denied upon written request to the applicable school district superintendent." 22 Pa. Code §4.4(d)(4).

The PDE also maintains a website [http://www.pde.state.pa.us/home_education] devoted to

home education, which contains the text of Act 169, a list of frequently asked questions about home schooling and compliance with Act 169, sample forms and affidavits, acceptable tests, academic standards, and links to various resources available to assist home schooling parents, guardians and supervisors.

E. Pennsylvania Religious Freedom Protection Act

In 2002, the Pennsylvania General Assembly enacted the Religious Freedom Protection Act ("RFPA"), P.L. 1701, No. 214, Dec. 9, 2002, 71 Pa. Stat. Ann. §§2401-2407, described as "An Act protecting the free exercise of religion; and prescribing the conditions under which government may substantially burden a person's free exercise of religion." 71 Pa. Stat. Ann. §2401. The RFPA was predicated on the following legislative findings:

> (1) Laws and governmental actions which are facially neutral toward religion, as well as laws and governmental actions intended to interfere with religious exercise, may have the effect of substantially burdening the free exercise of religion. However, neither State nor local government should substantially burden the free exercise of religion without compelling justification.

> (2) The General Assembly intends that all laws which it has heretofore enacted or will hereafter enact and all ordinances and regulations which have been or will be adopted by political subdivisions or executive agencies shall be construed so as to avoid the imposition of substantial burdens upon the free exercise of religion without compelling justification.

71 Pa. Stat. Ann. §2402.

The RFPA provides that an "agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability," unless the "agency proves, by a preponderance of the evidence, that the burden is (1) In furtherance of a compelling interest of the agency, and is (2) The least restrictive means of furthering the compelling interest." 71 Pa. Stat. Ann. §2404.

The RFPA permits a person whose free exercise of religion has been burdened to assert the violation against the agency as a claim or defense in any judicial proceeding. 71 Pa. Stat. Ann. §2405(a). Barring certain exigent circumstances not asserted herein, 71 Pa. Stat. Ann. §2405(c), prior to raising such a claim or defense, the person must provide written notification, by certified mail, return receipt requested, informing the agency that:

> (1) The person's free exercise of religion has been or is about to be substantially burdened by an exercise of the agency's governmental authority.
>
> (2) A description of the act or refusal to act which has burdened or willburden the person's free exercise of religion.
>
> (3) The manner in which the exercise of the governmental authority burdens the person's free exercise of religion.

71 Pa. Stat. Ann. §2405(b)(1-3).

If a person asserting a claim or defense in accordance with the RFPA "proves, by clear and convincing evidence, that the person's free exercise of religion has been burdened or likely will be burdened," a court "may award the person such declaratory or injunctive relief as may be appropriate." 71 Pa. Stat. Ann. §2405(f). The awarding of monetary damages is strictly prohibited; attorney's fees may only be awarded when the actions of the agency were vexatious or dilatory. 71 Pa. Stat. Ann. §2405(f).

The RFPA applies "to any State or local law or ordinance and implementation of that law, whether statutory or otherwise and whether adopted or effective prior to or after the effective date of this act." 71 Pa. Stat. Ann. §2406(a). Furthermore, the application of the RFPA shall not "be construed to authorize any government to prohibit or penalize the holding of any religious belief or to take any action

contrary to the Constitution of the United States or the Constitution of Pennsylvania." 71 Pa. Stat. Ann. §2407.

The General Assembly has provided definitions for some of the critical terms of the RFPA, as follows:

> "Free exercise of religion." The practice or observance of religion under section 3 of Article I of the Constitution of Pennsylvania.
>
> "Person." An individual or a church, association of churches or other religious order, body or institution which qualifies for exemption from taxation under section 501(c)(3) or (d) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 501).
>
> "Substantially burden." An agency action which does any of the following:
>
> (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs.
>
> (2) Significantly curtails a person's ability to express adherence to the person's religious faith.
>
> (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion.

> (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

71 Pa. Stat. Ann. §2403.

Article I, Section 3 of the Pennsylvania Constitution provides that "all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience," that "no man can be compelled to attend, erect, or support anyplace of worship or to maintain any ministry against his own consent," and that no human authority can interfere with the "rights of conscience and no preference shall ever be given by law to any religious establishment or modes of worship." Pa. Const., Art. I, §3.

F. Historical and Legislative Background of the Pennsylvania Religious Freedom Protection Act

It is important to understand the historical and legislative background of the RFPA, to place it in proper context and to inform this Court's statutory interpretation of the RFPA and to properly resolve the statutory and constitutional challenges to Act 169, the home schooling statute.

Prior to 1990, legislation challenged under the Free Exercise Clause of the First Amendment was subjected to a strict scrutiny analysis. See Sherbert v. Verner, 374 U.S. 398 (1963). Under this test, laws which had the effect of substantially burdening the practice of a person's religion were declared an

unconstitutional infringement on the free exercise of religion unless the state could show a compelling interest justifying the legislation, and that there were no less restrictive ways to further that interest. Id. at 402-404; see also Hernandez v. Commissioner, 490 U.S. 680 (1989) (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult).

In 1990, the Free Exercise Clause landscape changed significantly with Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). In the Smith case, the United States Supreme Court held that the Free Exercise Clause did not prohibit application of Oregon's drug laws to the ceremonial ingestion of peyote, and thus, the state could, consistent with that clause, deny claimants unemployment compensation for work-related misconduct based on their use of the drug. Speaking for the Court, Justice Antonin Scalia summarized the Free Exercise jurisprudence as follows:

> The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, see Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .." U.S. Const., Amdt. 1 (emphasis added.) The free exercise of religion means, first and foremost, the

> right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." Sherbert v. Verner, supra, 374 U.S., at 402. The government may not compel affirmation of religious belief,. . . punish the expression of religious doctrines it believes to be false,... impose special disabilities on the basis of religious views or religious status,. . . or lend its power to one or the other side in controversies over religious authority or dogma ....

Id. at 876-77 (parallel and certain other citations omitted).

However, Justice Scalia noted that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." Id. at 878-79. The right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." Id., at 898, relying, inter alia, on United States v. Lee, 455 U.S. 252, 263, n. 3 (1982) (Stevens, J., concurring in judgment) (religious belief of Amish taxpayer in conflict with payment of taxes affords no basis for resisting tax imposed on employers to support social security system, which

must be applied uniformly to all except as Congress provides explicitly otherwise).

Accordingly, the United States Supreme Court held that, although a state would violate the Free Exercise Clause if it sought to ban the performance of (or abstention from) physical acts solely because of their religious motivation, Smith, 494 U.S. at 877-78, the Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice, and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons. Id. at 879-882.

The Court acknowledged two exceptions to the general rule that religiously neutral laws of general applicability do not violate the Free Exercise Clause. First, as noted above, the Court recognized that a law which was neutral and general in its terms and applicability, but was nevertheless deliberately enacted to impact some religious practice, would still be subjected to strict scrutiny. Id. at 877-78. Second, the Court mentioned, in dictum, that the "only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action," were ones which "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press ...." Id. at 881. This exception has come to be known as the "hybrid

rights" exception, of which the Court listed the following examples:

> Cantwell v. Connecticut, 310 U.S., at 304-307 . . . (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); Follett v. McCormick, 321 U.S. 573 (1944) (same), or the right of parents, acknowledged in Pierce v. Society of Sisters, 268 U.S. 510 (1925), to direct the education of their children, see Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school) ....

Id. at 881 (parallel citations omitted).

Finally, the Smith decision did not dilute the authority of the state to enact laws that protect its citizens' right to freely practice their religious beliefs. The Court stated:

> Values that are protected against government interference through enshrinement in the Bill of Rights are

> not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use.

Id. at 890.

Following the Smith case, Congress and many state legislative assemblies accepted the Court's "invitation" to "enact laws that affirmatively foster" the free exercise of religion, as summarized recently by the United States Supreme Court in Cutter v. Wilkinson 125 S.Ct. 2113 (May 31, 2005). Noting "there is room for play in the joints" between the Free Exercise and Establishment Clauses, 125 S.Ct. at 2121, citing Smith, 494 U.S. at 669, and that there is space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause, the Supreme Court held that the section of the Federal Religious Land Use and Institutionalized Persons Act ("RLUIPA") increasing the level of protection of prisoners' and other incarcerated persons' religious rights did not violate the Establishment Clause of the First Amendment.

The Court summarized the post-Smith legislative reaction as follows:

> RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents.
>
> Responding to Smith, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA),. . . [which] "prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" City of Boerne v. Flores, 521 U.S. 507, 515-516 (1997) (brackets in original) (quoting § 2000bb-1). "[U]niversal" in its coverage, RFRA "applie[d] to all Federal and State law," id., at 516, 117 S.Ct. 2157 (quoting former § 2000bb-3(a)), but notably lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds. In City of Boerne, this Court invalidated RFRA as applied to States and their subdivisions, holding that the

Act exceeded Congress' remedial powers under the Fourteenth Amendment. Id., at 532-536. FN2

FN2. RFRA, Courts of Appeals have held, remains operative as to the Federal Government and federal territories and possessions. . . . This Court, however, has not had occasion to rule on the matter.

Congress again responded, this time by enacting RLUIPA. Less sweeping than RFRA, and invoking federal authority under the Spending and Commerce Clauses, RLUIPA targets two areas: Section 2 of the Act concerns land-use regulation, 42 U.S.C. § 2000cc; § 3 relates to religious exercise by institutionalized persons, § 2000cc-1. Section 3, at issue here, provides that "[n]o [state or local] government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government shows that the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." § 2000cc-1(a)(1)-(2). The Act defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of

> religious belief." § 2000cc-5(7)(A). Section 3 applies when "the substantial burden [on religious exercise] is imposed in a program or activity that receives Federal financial assistance," or "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." § 2000cc-1(b)(1)-(2). "A person may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." § 2000cc-2(a).

125 S.Ct. at 2118-2119 (parallel and other citations and certain footnotes omitted).

Numerous states passed their own religious freedom restoration or protection legislation in response to the Smith and City of Boerne cases, to restore the traditional (compelling interest, strict scrutiny) test. See generally Porto, Brian L., J.D., Validity, Construction and Operation of State Religious Freedom Restoration Acts, 116 A.L.R. 5th 233 (2005); Menninger, Karl A., J.D., Interference With the Right to Free Exercise of Religion, 63 Am. Jur. Proof of Facts 3d 195 (2005). Pennsylvania is one such state, as remarks by the RFPA's co-sponsor, President pro tempore Senator Robert C. Jubelirer and many other Senators demonstrate. 186th Gen. Assem., Pa. Senate Journal, 2002 Reg. Sess. No. 67, Bill on Third Consideration and Final Passage (November 20, 2002).

III. The Litigation

After completion of discovery and submission of Defendants' statements of material facts and plaintiffs' response thereto, the Court finds there are no disputed *material* facts that need to be resolved by a finder of fact. The facts of the litigation set forth below are gathered primarily from the parties' initial pleadings (i.e., complaints and answers), as supplemented by the statements of material facts and responses thereto.

A. Combs v. Homer-Center School District, Civil Action No. 04-1599

Plaintiffs Darrell and Kathleen Combs filed suit against Homer-Center School District and Joseph F. Marcoline, in his official capacity as Superintendent of the School District, in the Court of Common Pleas of Indiana County, Pennsylvania, on September 23, 2004, seeking both declaratory and injunctive relief pursuant to the RFPA, the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983. (Complaint, Intro.). Defendants removed the case to United States District Court for the Western District of Pennsylvania, pursuant to 28 U.S.C. §1441, on October 19, 2004. The pertinent factual averments from the complaint are as follows.

The Combs are the parents of children who are of compulsory school age within the statutory language of the Pennsylvania School Code, 24 P.S. §1326, and reside within the boundaries of the Homer-Center School District. (Complaint, ¶¶1, 2).

Pursuant to Act 169, Plaintiffs elected to home school their children based on sincerely held religious beliefs for the past eight years. (Complaint, ¶5). Defendants are charged with administering the Home Education Program and the enforcement of Pennsylvania's compulsory school attendance laws. (Complaint, ¶4). In accordance with Act 169, Plaintiffs submitted an affidavit stating their proposed educational objectives for the 2003-2004 school year on or about June 5, 2003. (Complaint, ¶6). In a letter dated July 28, 2003, Plaintiffs notified Defendants that Act 169 imposed substantial burdens on the free exercise of their religion. (Complaint, ¶¶7, 10). Furthermore, in reliance upon the RFPA, Plaintiffs sought "the protection of the [RFPA]" (Complaint, ¶8).

Plaintiffs concede that their "religious beliefs acknowledge that the civil government may require them to educate their children, but according to their religious belief, the civil government lacks jurisdiction to approve or administratively supervise the education they provide." (Complaint, ¶12). Plaintiffs express the sincerely held religious belief that "God has given parents jurisdiction and authority over the education of their children," that it would be "sinful for them to engage in conduct or expression that would grant control over their children's education to the civil government... [or require them to] seek approval from the secular civil government for the holy and sacred education that they are duty bound by God to provide their children," and that "parents are charged by God to raise their children in the nurture and admonition of the Lord." (Complaint, ¶¶13-16).

More specifically, Plaintiffs complain that: (1) Act 169 cedes too much control over their children's religious education to Defendants, and requires them to become "excessively associated" with the School District, in requiring them to submit an affidavit outlining their educational objectives to Defendants at the beginning of each school year; (2) their free exercise of religion is substantially burdened because Act 169 requires that they submit an educational log and a portfolio containing samples of their children's work to Defendants for discretionary administrative review; and (3) Act 169 confers the district superintendent with unbridled "authority, jurisdiction, and subjective discretion to approve the appropriateness of the religious education they provide their children based upon his review of the educational log and portfolio." (Complaint, ¶¶22, 23, 24).

Defendant Marcoline warned Plaintiffs that if they chose to pursue an exemption from Act 169 based on their religious beliefs, he would be compelled to enforce Pennsylvania's compulsory school attendance laws, and subsequently, Marcoline requested Plaintiffs submit their formal evaluation, educational log, and portfolio containing samples of their children's educational work for administrative review. (Complaint, ¶28-29). Plaintiffs responded that they did not intend to submit the requested materials because they were claiming a religious exemption under the Pennsylvania Religious Freedom Protection Act. (Complaint, ¶30). Based upon Plaintiffs' failure to comply, Defendant Marcoline initiated a prosecution against Plaintiffs for truancy. (Complaint, ¶¶40, 41, 42).

Plaintiffs also aver that Superintendent Marcoline did not notify them of his initial determination that "appropriate education" was not taking place, and did not initiate the "appeal" and hearing procedures required by the home schooling act for making a final determination about the "appropriate education." (Complaint, ¶¶31-36).

Plaintiffs' complaint sets forth seven counts. Count I claims that Act 169 violates the RFPA. (Complaint, ¶¶22, 23, 49, 52). Count II asserts violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution because Act 169's educational log and portfolio requirements "vest Defendants with unbridled discretionary review" of Plaintiffs' religious home education to determine whether appropriate education is occurring. (Complaint, ¶59). Count III alleges that Act 169 violates the Due Process Clause because the statute fails to provide a "neutral magistrate," one who has no vested financial stake in the outcome of the decision. (Complaint, ¶¶61, 62). The amount of state funding a district receives is determined, in part, by how many students attend the district; therefore, Plaintiffs allege, the district superintendent has an impermissible financial stake in determining whether appropriate home education is occurring. (Complaint, ¶¶64, 65).

Count IV alleges a Due Process violation because Act 169 invades Plaintiffs' right to privacy in requiring parents to maintain and submit to the district superintendent a detailed log of the titles of books read by their children and samples of their

children's educational work. (Complaint, ¶¶68, 69). Count V asserts a "prior restraints," First Amendment Free Speech violation, arguing that the "government cannot demand the right to review prior speech as a condition to exercising the right to engage in future speech." (Complaint, ¶71). Before parents can commence a home education program, Act 169 requires that they submit an affidavit prior to the start of each school year outlining their educational objectives. (Complaint, ¶73). After the first year of home schooling, Act 169 requires parents to obtain the discretionary approval of the district superintendent "in order to engage in further, future acts of protected speech for the following year." (Complaint, ¶¶72, 74).

Count VI alleges that Act 169 violates the First Amendment Establishment Clause by creating excessive entanglement with citizens' free exercise of religion. (Complaint, ¶77). Specifically, Plaintiffs assert that the Establishment Clause prohibits state agencies from conducting discretionary reviews of the content of religious education, or from having the power to "authorize or approve religious education." (Complaint, ¶78). Plaintiffs argue that Act 169's requirement that they submit an educational log and a portfolio to the Superintendent at the end of each school year for his discretionary review is itself a form of excessive entanglement because Defendants have the authority to determine whether appropriate religious home education is occurring. (Complaint, ¶79).

Finally, Count VII asserts that Act 169 violates the Free Exercise Clause. "Generally

applicable, neutral statutes that impose substantial burdens on religiously motivated conduct that is reinforced with the rights of parents to direct their children's religious home education violates the Free Exercise Clause unless supported by a compelling state interest and the least restrictive means is employed to realize that state interest." (Complaint, ¶81). Plaintiffs assert that Act 169 imposes substantial burdens on their free exercise of religion because the statute compels them to engage in conduct and expression that violate specific tenets of their religious faith. (Complaint, H 82). Also, Plaintiffs allege that there is no compelling state interest in burdening Plaintiffs' free exercise of religion, and if there is, the least restrictive means were not employed to realize that interest. (Complaint, ¶ 81).

Plaintiffs seek a preliminary and permanent injunction, enjoining Defendants from prosecuting Plaintiffs under the compulsory education laws for truancy because of their refusal to submit the logs and portfolios required by Act 169. Plaintiffs also request this Court to render the following declaratory relief: (i) to declare that Act 169 compels conduct and expression that violates specific tenants of Plaintiffs' religious faith, and therefore violates the RFPA; (ii) to declare Act 169's log and portfolio requirements "void for vagueness" under the Due Process Clause, on its face and as applied to Plaintiffs' "religious education program"; (iii) to declare Act 169's "requirement for a superintendent's review of the contemporaneous log and portfolio" unconstitutional on its face and as applied, because the superintendent is not a "neutral

magistrate"; (iv) to declare Act 169's "requirement for a superintendent's review of the contemporaneous log and portfolio" unconstitutional on its face and as applied, because it violates Plaintiffs' Due Process right to privacy; (v) to declare Act 169's requirement that parents submit an outline of proposed course objectives by subject area unconstitutional on its face and as applied because it amounts to "prior restraint" of speech, prohibited by the Free Speech Clause of the First Amendment; (vi) to declare Act 169's "requirement for a superintendent's review of the contemporaneous log and portfolio" unconstitutional as applied, because it results in "excessive entanglement with religion" in violation of the Establishment Clause of the First Amendment; and (vii) to declare Act 169's "requirement for a superintendent's review of the contemporaneous log and portfolio" unconstitutional on its face and as applied under the Free Exercise Clause of the First amendment.

Defendants have not averred any significant factual denials in their answer; rather, Defendants aver the following affirmative defenses: (1) Plaintiffs' complaint fails to state a claim for which relief can be granted; (2) Act 169 does not substantially burden Plaintiffs' free exercise of their religion since the Act is a generally applicable, neutral statute that is not hostile towards religion; (3) the RFPA is itself

unconstitutional[14] because it unlawfully creates substantive rights and violates traditional separation of powers between the legislature and the judiciary; (4) Plaintiffs' claims are barred by any applicable statute of limitations and/or laches; (5) Plaintiffs' claims are barred by the doctrine of privilege; (6) Plaintiffs' claims are barred by the doctrine of justification; (7) Plaintiffs consented to the requirements of the home education program of Act 169 by electing to home school their children; (8) Defendants are entitled to any immunity as provided by state and/or federal law; (9) Act 169 neither burdens Plaintiffs' free exercise of their faith nor causes excessive entanglement; (10) Plaintiffs' right to privacy has not been violated because the government has a legitimate and compelling interest in ensuring the education of children, and Act 169 is not unwarranted government intrusion into the rearing and education of Plaintiffs' child; (11) Act 169 does not impose any restraint on Plaintiffs' exercise of free speech; and (12) Plaintiffs' free exercise of religion has not been violated since the government has a legitimate and compelling interest in ensuring the education of children, and Act 169 is not unwarranted government intrusion into the education of Plaintiffs' children. (Answer, ¶¶13, 14).

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[14] It is unusual, if not improper, for a state agency charged with enforcing the laws of Pennsylvania to challenge legislation as unconstitutional, especially in the absence of participation by the Attorney General for the Commonwealth of Pennsylvania. Defendants have not advanced this argument in their motion for summary judgment or in response to Plaintiffs' motion for summary judgment.

B. Previsch v. Norwin School District- Civil Action No. 04-1670

Plaintiffs Thomas and Timari Previsch filed suit against Norwin School District and Richard Watson, in his official capacity as Superintendent, in the Court of Common Pleas of Westmoreland County, Pennsylvania on September 27, 2004, seeking both declaratory and injunctive relief pursuant to the RFPA, the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983. (Complaint, Intro.). This Court obtained jurisdiction pursuant to Defendants' motion for removal pursuant to 28 U.S.C. §1441. The factual averments and legal claims set forth in the Previsch complaint are quite similar to those in the Combs' complaint.

The Previshes are the parents of children who are of compulsory school age and reside within the boundaries of the Norwin School District. (Complaint, ¶¶1, 2). Pursuant to Act 169, Plaintiffs elected to home school their son, Thomas Previsch, based on sincerely held religious beliefs for the past seven years. (Complaint, ¶9). Defendants are charged with administering the home education program and the enforcement of Pennsylvania's compulsory school attendance laws. (Complaint, ¶4). In accordance with the RFPA, Plaintiffs notified Defendants on August 1, 2004, that Act 169 substantially burdens their free exercise of religion and sought an exemption. (Complaint, ¶¶13, 14, 16). Plaintiffs believe: (1) Defendants "lack jurisdiction to approve or administratively supervise the education" they provide Thomas Previsch, (Complaint, ¶18), and

that it would be sinful to: (1) "engage in conduct and expression that would seek approval from the secular civil government" for the religious home education they are duty-bound by God to provide their children. (Complaint, ¶23). Specifically, Plaintiffs object to filing an affidavit outlining their educational objectives prior to the start of each school year. (Complaint, ¶29). Furthermore, Plaintiffs object to submitting an educational log and a portfolio containing samples of Thomas Previsb's educational work. (Complaint, ¶30). In a letter dated September 7, 2004, Timothy McCabe, agent for Defendants, informed Plaintiffs that Thomas Previsb was absent from school without lawful excuse. (Complaint, ¶32). The letter further stated that if Thomas is subsequently absent from school, Plaintiffs will be charged with truancy. (Complaint, ¶34). Thus, unless exempted from complying with Act 169, Plaintiffs will be subjected to criminal prosecution for truancy. (Complaint, ¶33).

The seven claims averred are virtually identical to those set forth in the complaint in *Combs*. (Complaint ,¶¶ 38-75). Defendants aver only one significant denial: Defendants deny that Act 169 is vague; rather, Defendants aver that the hearing officer created by Act 169 is a neutral and detached adjudicator with little or no financial interest, because the number of students attending Norwin School District is only one factor in determining how much state funding Norwin receives. (Answer, ¶57). Furthermore, Defendants aver affirmative defenses identical to those in *Combs* (Answer, ¶¶1-14), and raise the following additional affirmative defenses: (1) Plaintiffs have failed to mitigate any alleged

harm (Answer, ¶7); (2) it is not a "sincerely held religious belief" that to cede authority and/or discretion to Defendants in order to educate Thomas Prevish is a sin, because it is not a tenet of the "Church's Magisterium," sacred Scripture, nor sacred tradition as alleged by Plaintiffs (Answer, ¶10); (3) Plaintiffs waived their right to challenge Act 169 by settling with Defendant in agreeing to comply with the terms of the home education program of Act 169 on November 6, 2003. (Answer, ¶4).

C. Hankin v. Bristol Township School District - Civil Action No. 04-1936

Plaintiffs Thomas and Babette Hankin filed suit against Bristol Township School District and Regina Cesario, in her official capacity as Superintendent, in the United States District Court for the Western District of Pennsylvania on December 22, 2004, seeking both declaratory and injunctive relief pursuant to the RFPA, the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983. (Complaint, Intro.).[15] This Court obtained jurisdiction pursuant to 28 U.S.C. §1343(3)(4) and §1331. (Complaint, ¶2). The RFPA state law claim is predicated on this court's supplemental jurisdiction. 28 U.S.C. § 1367.

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[15] Ordinarily, this case would have been filed in the United States District Court for the Eastern District of Pennsylvania, but aware of the several similar cases in the Western District of Pennsylvania, the parties agreed that Plaintiffs would file the case in this district and Defendants would not object to venue, in the interests of conservation of judicial and legal resources.

The pertinent factual averments of the pleadings are as follows.

The Hankins are the parents of children who are of compulsory school age and reside within the boundaries of Bristol Township School District. (Complaint, ¶ 4, 5). Pursuant to Act 169, Plaintiffs elected to home school their children based on sincerely held religious beliefs for the past eleven years. (Complaint, ¶ 8). Plaintiffs notified Defendants on April 2, 2004, that Act 169 substantially burdens their free exercise of religion. (Complaint, ¶ 10). Specifically, Plaintiffs object to: (1) filing an affidavit outlining their educational objectives prior to the start of each school year, and (2) submitting an educational log and a portfolio containing samples of their children's educational work. (Complaint, ¶¶ 25, 26). Hence, Plaintiffs claimed an exemption under the RFPA in their letter dated March 6, 2004. (Complaint, ¶ 11). Defendants' agents informed Plaintiffs that their children were illegally absent from school, and warned that if the children were not enrolled in public school, private school, or a registered home schooling program within three days, Defendants would charge Plaintiffs with truancy. (Complaint, ¶¶ 28, 29). Thus, unless exempted from Act 169, Plaintiffs will be subject to criminal proceedings for truancy. (Complaint, ¶ 30).

The claims averred are identical to those in *Combs and Previsb*. (Complaint, ¶¶ 38-75). Similarly, Defendants aver affirmative defenses identical to those in *Combs*, although Defendants aver one additional affirmative defense. (Answer, ¶¶

69-81). Defendants assert that Plaintiffs' claims are barred because they failed to exhaust administrative remedies. (Answer, ¶ 80). Pursuant to local agency law, prior to bringing a matter before a court vested with jurisdiction there must be a final adjudication by the local agency. In this instance, Plaintiffs failed to request a hearing before the Board of School Director for Bristol Township School District regarding the allegations in their complaint.

D. Newborn v. Franklin Regional School District - Civil Action No. 04-1932

Plaintiffs Mark and Maryalice Newborn filed suit against Franklin Regional School District and Stephen Vak, in his official capacity as Superintendent, in the United States District Court for the Western District of Pennsylvania on December 21, 2004, seeking both declaratory and injunctive relief pursuant to the RFPA, the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983. (Complaint, Intro.). This Court obtained jurisdiction pursuant to 28 U.S.C. §1343(3)(4) and 28 U.S.C. §1331. (Complaint, ¶2). The pertinent factual averments of the pleadings are as follows.

The Newborns are the parents of children who are of compulsory school age and reside within the boundaries of Franklin Regional School District. (Complaint, ¶¶5, 6). Pursuant to Act 169, Plaintiffs elected to home school their children based on sincerely held religious beliefs for the past twelve years. (Complaint, ¶9). In accordance with the

RFPA, Plaintiffs notified Defendants on August 1, 2003, that Act 169 substantially burdens their free exercise of religion and sought an exemption. (Complaint, ¶¶10, 11, 13). Plaintiffs believe that: (1) Defendants "lack jurisdiction to approve or administratively supervise the education" they provide their children, and (2) that it would be sinful to "engage in conduct and expression that would seek approval from the secular civil government" for the religious home education they are duty-bound by God to provide their children. (Complaint, ¶¶15, 18). Specifically, Plaintiffs object to filing an affidavit outlining their educational objectives prior to the start of each school year. (Complaint, ¶26). Furthermore, Plaintiffs object to submitting an educational log and a portfolio containing samples of their children's educational work. (Complaint, ¶ 27). In a letter dated November 21, 2003, Defendants informed Plaintiffs that they did not believe that the home education program imposed substantial burdens on the free exercise of Plaintiffs' religion. (Complaint, ¶ 29). Additionally, the letter stated that Defendants were considering initiating truancy proceedings because Plaintiffs failed to provide an affidavit outlining their educational objectives for the 2003-2004 school year. (Complaint, ¶31). Thus, unless exempted from complying with Act 169, Plaintiffs will be subjected to criminal prosecution for truancy. (Complaint, ¶ 33).

The claims averred are identical to those in the other complaints. (Complaint, ¶¶ 35-69). Similarly, Defendants aver affirmative defenses identical to those in *Combs*, and deny that their letter dated November 21, 2003, intimated that they

were considering initiating truancy proceedings. (Answer, ¶¶ 31, 71-89).

E. Nelson v. Titusville Area School District - Civil Action No. 05-070E

Plaintiffs Douglas and Shari Nelson filed suit against Titusville Area School District and John D. Reagle, in his official capacity as acting Superintendent, in United States District Court for the Western District of Pennsylvania on February 28, 2005, seeking both declaratory and injunctive relief pursuant to the RFPA, the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983. (Complaint, Intro.). This Court obtained jurisdiction pursuant to 28 U.S.C. §1343(3)(4) and 28 U.S.C. §1331. (Complaint, ¶2). The pertinent factual averments of the pleadings are as follows.

The Nelsons are parents of children who are of compulsory school age and reside within the boundaries of Titusville Area School District. (Complaint, ¶¶4, 5). Pursuant to Act 169, Plaintiffs elected to home school their children based on sincerely held religious beliefs for the past eight years. (Complaint, ¶8). In accordance with the RFPA, Plaintiffs notified Defendants that Act 169 substantially burdens their free exercise of religion and sought an exemption from Act 169. (Complaint, ¶¶9, 10). Plaintiffs believe: (1) Defendants "lack jurisdiction to approve or administratively supervise the education" they provide their children, and that (2) it would be sinful to "engage in conduct and expression that would seek approval from the

secular civil government" for the religious home education they are duty-bound by God to provide their children. (Complaint, ¶¶14, 18). Specifically, Plaintiffs object to filing an affidavit outlining their educational objectives prior to the start of each school year. (Complaint, ¶24). Furthermore, Plaintiffs object to submitting an educational log and a portfolio containing samples of their children's educational work. (Complaint, ¶25).

In letters dated August 11, 2004, and September 24, 2004, Defendants requested Plaintiffs submit their educational log and portfolio. (Complaint, ¶27). Subsequently, in a letter dated January 10, 2005, Defendants informed Plaintiffs that if they "did not submit portfolios for the 2003-2004 school year, and an affidavit of intent to home educate for the 2004-2005 school year," then Defendants would initiate truancy proceedings. (Complaint, ¶28). Thus, unless exempted from Act 169, Plaintiffs will be subjected to criminal prosecution for truancy. (Complaint, ¶30).

The claims averred are identical to those in *Combs* as are the affirmative defenses. (Complaint, ¶¶37-71; Answer ¶¶64-82).

F. Weber v. Dubois Area School District - Civil Action No. 05-203J

Plaintiffs Steven and Meg Weber filed suit against Dubois Area School District and Sharon Kirk, in her official capacity as Superintendent, in the United States District Court for the Western District of Pennsylvania on March 23, 2005, seeking

both declaratory and injunctive relief pursuant to the RFPA, the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983. (Complaint, Intro.). This Court obtained jurisdiction pursuant to 28 U.S.C. §1343(3)(4) and 28 U.S.C. §1331. (Complaint, ¶2). The pertinent factual averments of the pleadings are as follows.

The Nelsons are parents of children who are of compulsory school age and reside within the boundaries of Dubois Area School District. (Complaint, ¶¶4, 5). Pursuant to Act 169, Plaintiffs elected to home school their children based on sincerely held religious beliefs for the past eight years. (Complaint, ¶8). Defendants are charged with administering the Home Education Program and the enforcement of Pennsylvania's compulsory school attendance laws. (Complaint, ¶7). In accordance with the RFPA, Plaintiffs notified Defendants on July 10, 2004, that Act 169 substantially burdens their free exercise of religion and sought an exemption. (Complaint, ¶¶10, 12). Plaintiffs believe: (1) Defendants "lack jurisdiction to approve or administratively supervise the education," they provide their children, and (2) that it would be sinful to "engage in conduct and expression that would seek approval from the secular civil government" for the religious home education they are duty-bound by God to provide their children. (Complaint, ¶¶13, 17). Specifically, Plaintiffs object to filing an affidavit outlining their educational objectives prior to the start of each school year. (Complaint, ¶24). Furthermore, Plaintiffs object to submitting an educational log and a portfolio containing samples of

their children's educational work to Defendants for discretionary review. (Complaint, ¶25).

In a letter dated December 3,2004, Defendants' agent informed Plaintiffs that they did not believe the Home Education Program imposed substantial burdens on the free exercise of Plaintiffs' religion. (Complaint, ¶27). Subsequently, on January 11, 2004, Defendants informed Plaintiffs that they would initiate truancy proceedings unless Plaintiffs' children attended public school. (Complaint, ¶28). In response, Dewitt T. Black III, attorney for Home School Legal Defense Association, wrote to Defendants on behalf of the Plaintiffs on January 13, 2005, and on February 23, 2005, requesting that they wait to file truancy charges until five federal cases on the applicability of the RFPA to Act 169 were resolved." (Complaint, ¶29). Defendants replied on February 28, 2005, stating that they decided not to wait until the five outstanding federal cases were resolved prior to filing truancy charges. (Complaint, ¶30). Thus, unless exempted from complying with Act 169, Plaintiffs will be subjected to criminal prosecution for truancy. (Complaint, ¶31).

The claims averred are identical to those in *Combs* as are the affirmative defenses. (Complaint, ¶¶35-69, Answer, ¶¶1-14). In terms of denials, Defendants deny that Sharon Kirk, in her official capacity as Superintendent of Dubois Area School District, is subject to liability for the aforementioned claims. (Answer, ¶6). Also, Defendants averred that the parties have entered into a stipulation regarding the prosecution of truancy charged against Plaintiffs. (Answer, ¶30).

IV. Summary Judgment Framework and Standards

A. History of Plaintiffs' "Facial" Challenges

Because Plaintiffs are challenging Act 169 both "on its face" and "as applied," the Court decided, with input and consent of the parties, that two rounds of summary judgment motions would be the appropriate way to proceed, with the first round to address the "on its face" constitutional challenges, and the second round to address the "as applied" challenges. By Order of March 15, 2005, the Court consolidated all of the cases at Civil Action No. 04-1599, and directed a "consolidated summary judgment motion addressed to the threshold legal issues discussed at the conference" to be filed.

The initial motion for summary judgment by Plaintiffs (previously decided by the Court in Defendants' favor) was not expected to raise any "fact-driven" issues, since discovery was ongoing and briefing on such issues would be premature. Defendants were directed to file one consolidated response and brief in opposition, and Plaintiffs were permitted to file a reply brief. Subsequently, the Court granted the motion of the Commonwealth of Pennsylvania Department of Education to file an *amicus* brief in opposition to the motion for summary judgment, which "emphasize[d] the Commonwealth's compelling interest in ensuring high-quality home education without imposing an undue burden on the religious interests of parents." Amicus Brief at 1. Later, the Court directed the PDE to file a

supplemental brief addressing the interplay between the School Code and the RFPA. An additional status conference was conducted on April 11, 2005, for the purpose of clarifying the scope of the threshold summary judgment motion.

On May 31, 2005, Plaintiffs filed their consolidated motion for summary judgment, brief in support, concise statement of material facts, and 30 volumes of appendices. (Documents No. 29-61, respectively). The appendices consisted of the portfolios, logs, declarations and other documentation put together by the Plaintiffs in the six consolidated cases, and those put together by 24 other non-party parents and supervisors of home education programs in various party and non-party school districts. Because the 30 volumes of materials were not relevant to the threshold issues, the Court granted Defendants' joint motion to strike the appendices in part, stating that "Plaintiffs ... filed boxes of appendices (doc. nos. 32 through 61) consisting of 30 notebooks of factual information and declarations. The Court will not consider said material at this time but instead will stay focused on the threshold legal issues." Order of June 16, 2005 (Document No. 67).

In their concise statement of material facts ("CSM"), Plaintiffs make the following assertions. All of the Plaintiffs' home schooled children have been home schooled "between five and thirteen years." CSM ¶ 2. All of the Plaintiff-Parents believe that children are a gift from God, that "education is religion," that "God commands them to educate their children at home," that Plaintiffs "believe that the

requirements of Act 169 puts the State as the final authority over the education of their children, which is a violation of their religious belief," and that Act 169 "requires conduct or expression that violates their religious beliefs" making it impossible to comply with Act 169 "in good conscience." CSM, ¶¶ 6-11.

Plaintiffs assert that many of their portfolios include "religious work samples." CSM, ¶15. The concise statement of material facts then sets forth the following: descriptions of the portfolio/ documentation/ declaration appendices submitted by Plaintiffs and 24 non-parties, ¶¶16-42; descriptions of the "Effects of Portfolios," including that portfolios take time to assemble, provide no educational benefit, induce stress ("pre-portfolio syndrome"), that some of the portfolios were returned apparently without having been reviewed, and that "some home schooling parents feel it is an invasion of their privacy to meet with a school district supervisor to review their portfolios." CSM ¶¶ 43-52. The concise statement also complains that the various party and non-party school districts utilized a variety of approaches in reviewing the portfolios and logs, and applied varying degrees of intensity of review. CSM ¶¶ 53-79.

Finally, Plaintiffs make the following conclusory statements: the "detailed requirements of Act 169 as interpreted by the PDE are not in furtherance of a compelling state interest"; the "detailed requirements of Act 169 as interpreted by the PDE are not the least restrictive means" of furthering a compelling state interest; 27 states do

not require year-end assessments; 21 states require either standardized tests or evaluation, but not both; only eight other states require portfolios; no other state requires a detailed log. CSM ¶¶ 80-85.

B. The "Substantial Burden" Identified by Plaintiffs

Plaintiffs acknowledge that RFPA obligates them to first show that Act 169 imposes a "substantial burden" on the exercise of their religion, by clear and convincing evidence, in order to shift the burden of proof to the school districts and superintendents to justify that burden by demonstrating the state's compelling interest and that there are no less restrictive means of furthering that interest. Brief in Support of Plaintiffs' Motion for Summary Judgment at 5. The specific statutory burden Plaintiffs assert is the fourth identified by the RFPA, namely, where the agency action "[c]ompels conduct or expression which violates a specific tenet of a person's religious faith." 71 Pa. Stat. Ann. §2402(4). Brief in Support of Plaintiffs' Motion for Summary Judgment at 5.

Despite having home schooled their children from at least five to thirteen years, however, Plaintiffs do not specify any actual, tangible ways in which Act 169 impairs or restricts the exercise, practice, conduct or expression of their religion during those five to thirteen years or currently. The "Effects of Portfolios" that Plaintiffs identify as flowing from Act 169's portfolio and log requirements (i.e., these requirements are time consuming and stressful, and not beneficial to their children's

education) are the same effects encountered by all parents and supervisors of home schooled children, not just those who home school for religious reasons. In other words, these "Effects" do not describe any particular impact on the exercise, practice, conduct or expression of religion, but rather describe the common, general consequences caused by Act 169's requirements that home schoolers compile, organize and present portfolios and logs for review by school districts and their superintendents.

Although Plaintiffs state that their "focus" in this litigation is on Act 169's portfolio requirements, the only negative effect alleged that is not common to all home schoolers, and the only religious impact that a fair reading of Plaintiffs' concise statement of material facts and brief will sustain, is that Act 169 places "authority" over their children's education, which, to Plaintiffs, "is religion," in secular hands, and that placing of authority in any state agency violates their sincerely held religious beliefs. Brief in Support of Plaintiffs' Motion for Summary Judgment at 5-7. Plaintiffs state that "the Lord has established jurisdictional boundaries between the family and the State," that "subjecting their home education program to the authority, oversight and discretionary review of the State violates Biblically-ordained jurisdictional lines between the family and the State," and that these "twelve Plaintiffs, who come from diverse religious backgrounds, have each concluded that compliance with Act 169 amounts to an unbiblical surrendering of their God given authority as parents to the State." Brief in Support of Plaintiffs' Motion for Summary Judgment at 6-7.

C. Defendants' Motion for Summary Judgment - "As Applied" Challenges

After this Court's ruling on Plaintiffs' motion for summary judgment and completion of fact discovery, the school districts filed their consolidated motion for summary judgment (Document No. 100) asserting that "there is no genuine issue of material fact, nor could any fact finder reasonably conclude that the school districts have substantially burdened the practice of the Plaintiffs' faith in enforcing Act 169 or, 'as applied.'" Defendants' Motion for Summary Judgment, ¶ 4. In their consolidated concise statement of material facts, Defendants aver the following facts that are relevant to their implementation of Act 169.

1. Previsb v. Norwin School District - Civil Action No. 04-1670

The Previshes are Roman Catholics who use a religious based curriculum in home schooling their 12 year old son, the "Sonlight Curriculum." The school district has never interfered with their choice (or any parents' choice) of educational materials or in the education of their children, has never interfered in the Previshes' participation of the sacraments of their Roman Catholic faith, never rejected or denied any aspect of the Previshes' portfolios including religious based curriculum, and encourages parents to include any religious instruction in their portfolios. The Previshes did not object to compliance with Act 169 until August 26, 2004, when they informed the Superintendent that they did not

intend to continue to comply with its requirements. The school district has agreed to stay any truancy prosecution pending the outcome of this litigation.

2. Weber v. Dubois Area School District - Civil Action No. 05-2035

The Webers belong to the Tri-County Church of God, and are parents of two compulsory school aged children. The Webers concede that the school district never interfered with the God-centered education of their children, or their participation in any sacraments of their faith. The school district never rejected any home schooling plan because of its inclusion of religious instruction. The Webers object to the time and energy spent in compiling the portfolios and logs, and to the exercise of any authority by the state over the education of their children, based on their religious beliefs that God has delegated that authority to parents alone. On July 10, 2004, the Webers notified the school district that Act 169 had substantially burdened their religious beliefs, and sought an exemption from compliance, which was denied. The school district agreed to stay any truancy prosecution pending the outcome of this litigation.

3. Newborn v. Franklin Regional School District - Civil Action No. 04-1932

This school district reviews certifications by third party evaluators that "appropriate education" has taken place. The parents choose their own evaluators and the Newborns have chosen a like-

minded Christian evaluator to review their portfolios and logs and prepare the certificate. The school district has never disagreed with the certification of any evaluator that "appropriate education" has taken place, including that of the Newborns, never restricted the Newborns' choice of educational materials or curriculum, never questioned their logs or portfolios, and never questioned any of their reading materials, including religious based materials.

4. Nelson v. Titusville Area School District - Civil Action No. 05-070

The school district never questioned the Nelsons about their choice of curriculum or reading materials, which include the Bible, never challenged their home schooling program in any way, never rejected or questioned their portfolios, affidavits or logs, never placed any restrictions on the home schooling program with regard to the religious content of their reading materials or curriculum or otherwise, and the Nelsons never expressed any discomfort about including religious materials in their submissions. Two of the Nelsons' daughters who are home schooled participate fully in extracurricular activities of the school district.

5. Hankin v. Bristol Township School District - Civil Action 04-1936

The Hankins have seven school children ages 3 to 15, and are members of the Free Presbyterian Church of Malvern, Pennsylvania, who consider their religious beliefs have been substantially

burdened by having to comply with Act 169 because, by having to submit to the authority of an "ungodly" school district, they are sinning in God's eyes. The Hankins have no particular objections to submitting an affidavit about their home schooling program, about providing information about their educational curriculum or materials, about providing information about the children's supervisor, about providing the minimum number of hours in required courses, or to maintaining the logs, portfolios and affidavits to demonstrate compliance with Act 169. The school district has never rejected a home education program because of its use of religious materials and its evaluation of portfolios is unaffected by the inclusion of religious materials or curricula.

6. Combs v. Homer Center School District — Civil Action No. 04-1599

The Combs have always included a religious component as part of their home education program, and the school district has never rejected, disapproved or questioned any of their plans, rejected any portfolios or affidavits, never prevented or required the teaching of any particular curriculum or materials, including any religious based curriculum or materials, and has never interfered with the Combs providing religious education to their children.

D. Plaintiffs' Response to Defendants' Concise Statement of Material Facts

In their consolidated response, there is remarkably little dispute over the material facts. Plaintiffs concede (or, at a minimum, they do not dispute or offer evidence to counter) the facts averred in Defendants' consolidated concise statement that none of the school districts ever interfered with or rejected any of the parents' choice of educational curricula or materials, including religious based curricula and materials; none of the school districts ever rejected or disapproved any of the parents' affidavits, portfolios or logs; none of the school districts ever rejected or disapproved any of the third party evaluators' certificates of "appropriate education"; none of the school districts ever interfered with any parent's or child's participation in the sacraments, practice, conduct or exercise of their religious faith; and none of the school districts ever objected to the teaching of religious instruction as part of any home schooling program.

Plaintiffs do not concede, however, that the conduct or expression of their religion has not been substantially burdened by Act 169. To the contrary, Plaintiffs claim that Act 169 places a fundamental substantial burden on a central tenet of their religion, namely, that "education is religion," and that the assertion by the Commonwealth of Pennsylvania *of any* authority over the education of their children violates their religious principles. As

Plaintiffs state in their brief in opposition to Defendants' Motion for Summary Judgment:

> As the memorandum opinion [of December 8, 2005 (Document No. 84)] correctly points out, the Plaintiffs have each expressed a religious belief that "Act 169 places 'authority' over their children's education, which, to Plaintiffs, 'is religion,' in secular hands, and that placing of authority in any state agency violates their sincerely held religious beliefs." *Combs*, 2005, WL 3338885 at *24. It is also accurate to state, as the opinion does, that Plaintiffs believe that "'the Lord has established jurisdictional boundaries between the family and the State,' that 'subjecting their home education program to the authority, oversight and discretionary review of the State violates biblically ordained jurisdictional lines between the family and the State.'"

Plaintiffs' Brief In Opposition to Defendants' Motion for Summary Judgment (Document No. 104), at 9.

In Plaintiffs' view, the requirement that they keep logs and portfolios and submit them to the school districts is both conduct and expression that violates their religious beliefs, and the requirement that they submit their home education programs to the school districts for approval "is tantamount to bowing down before Nebuchadnezzar's golden

statute." Plaintiffs' Brief In Opposition to Defendants' Motion for Summary Judgment (Document No. 104), at 10.

In summary, there is no material dispute of fact in this case. There is a dispute, but it is a fundamental philosophical, societal and theological dispute over the authority to educate children in the Commonwealth of Pennsylvania. Thus, the Court finds that there is no dispute that implementation of Act 169 by the Defendant school districts has had no concrete, tangible, discernible impact on the practice, conduct or expression of Plaintiffs' religion. On the other hand, there also is no dispute that the very *existence* of Act 169, which requires school districts to ascertain that all of its compulsory age children are receiving "appropriate education," is completely antithetical to Plaintiffs' sincerely held religious beliefs that reject any secular authority over the education of their children.

As there are no genuine issues of disputed material facts, the Court will proceed to address and resolve the genuine issues of disputed legal principles, and decide them as a matter of law.

E. Summary Judgment Standards

Summary judgment under Fed.R.Civ.P. 56(c) is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Woodside v. School Dist. of Philadelphia Bd. of

Educ., 248 F.3d 129, 130 (3d Cir. 2001), quoting Foehl v. United States, 238 F.3d 474, 477 (3d Cir.2001) (citations omitted). In deciding a summary judgment motion, the court must "view the evidence . . . through the prism of the substantive evidentiary burden" to determine "whether a jury could reasonably find either that the Plaintiff proved his case by the quality and quantity of the evidence required by the governing law or that he did not." Anderson v. Consolidated Rail Corp., 297 F.3d 242, 247 (3d Cir. 2002), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).

When the non-moving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing' — that is, pointing out to the District Court — that there is an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the moving party has carried this burden, the burden shifts to the non-moving party who cannot rest on the allegations of the pleadings and must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1230 (3d Cir. 1993). Thus the non-moving party cannot rest on the pleadings, but instead must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial," Fed.R.Civ.P. 56(e), and cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of W.

Chester, 891 F.2d 458, 460 (3d Cir.1989) (citing Celotex, 477 U.S. at 325 (1986)). The non-moving party must respond "by pointing to sufficient cognizable evidence to create material issues of fact concerning every element as to which the non-moving party will bear the burden of proof at trial." Simpson v. Kay Jewelers, Div. Of Sterling, Inc., 142 F.3d 639, 643 n. 3 (3d Cir. 1998), quoting Fuentes v. Perskie, 32 F.3d 759, 762 n. 1 (3d Cir. 1994).

"In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence 'is to be believed and all justifiable inferences are to be drawn in his favor.' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)." Marino v. Industrial Crating Co., 358 F.3d 241, 247 (3d Cir. 2004.) See also Doe v. County of Centre, PA, 242 F.3d 437, 446 (3d Cir. 2001) (court must view facts in the light most favorable, draw all reasonable inferences, and resolve all doubts, in favor of the nonmoving party).

V. Discussion of Legal Issues

A. Pennsylvania Religious Freedom Protection Act

1. Canons of Construction

As far as the Court and parties are aware, the RFPA of 2002 has not been interpreted by any court in the Commonwealth of Pennsylvania, state or federal, and its applicability and effect in this case is a matter of first impression. In interpreting the

RFPA, the Court will consider Pennsylvania's relevant canons of construction, codified at 1 Pa.C.S. §§1900-1978.

All statutory construction of Pennsylvania statutes is guided by the principle that the canons adopted by the legislature shall be observed, unless the application of such canons would result in construction inconsistent with the manifest intent of the General Assembly. 1 Pa. C.S.A. §1901. The "object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S.A. §1921. This is the primary rule of statutory construction and all other rules of statutory construction are secondary thereto. Pennsylvania Human Relations Comm'n v. Alto-Reste Park Cemetery Ass'n, 306 A.2d 881, 885 (Pa. 1973).

Words and phrases used in statutes enacted by the General Assembly are to be construed according to their common usage, whereas technical words and phrases that have acquired a peculiar meaning shall be construed to such peculiar definition. 1 Pa. C.S.A. § 1903.[16] When the words of a statute are free from all ambiguity, those provisions are not to be disregarded under the pretext of

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[16] See e.g. Commonwealth v. Hill, 391 A.2d. 1303, 1306 (Pa. 1973) (emphasis added), ("Language of statute must be construed according to common and approved usage, and where possible it should be interpreted in manner so as to give effect to each and every provision of act."); Commonwealth v. Mumma, 414 A.2d 1026, 1029 (Pa. 1980), ("When interpreting a statute, Supreme Court is guided by the plain meaning rule of construction.").

pursuing its spirit, 1 Pa. C.S.A. §1921;[17] rather, "[w]hen the words of a statute are plainly expressive of an intent, the interpretation must be in accordance therewith." Bradbury v. Wagenhorst, 54 Pa. 180 (1867). Conversely, when a statutory term is ambiguous on its face, the intention of the General Assembly may be ascertained by considering:

> (1) the occasion and necessity for the statute, (2) the circumstances under which it was enacted, (3) the mischief to be remedied, (4) the object to be attained, (5) the former law, if any, including other statutes upon the same or similar subjects, (6) the consequences of a particular interpretation, and (7) the contemporaneous legislative history, and (8) legislative and administrative interpretations of such statute.

1 Pa. C.S.A. §1921.[18]

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[17] See e.g. Commonwealth v. Pope, 317 A.2d 887, 889 (Pa. 1974), ("A court may not alter, under the guise of 'construction,' the express language and intent of the legislature."); Commonwealth ex rel. Cartwright v. Cartwright, 40 A.2d 30, 33 (Pa. 1944) ("When language of statute is plain and unambiguous and conveys clear and definite meaning, there is no occasion for resorting to rules of statutory construction, but statute must be given its plain and obvious meaning, though court may be convinced by extraneous circumstances that legislature intended to enact something very different.").

[18] See e.g. Frontini v. Com. Dept. of Transp., 593 A.2d 410, 412 (Pa. 1991), ("Whenever a court attempts to ascertain the meaning of language within a statute, its goal is to

Courts shall construe every statute to give effect to all its provisions. 1 Pa. C.S.A. §1921.[19] Thus, the "language of a statute must be construed, where possible, in a manner so as to give effect to each and every provision of the act." Commonwealth. v. Hill, 391 A.2d. 1303, 1306 (Pa. 1973).

In ascertaining the intention of the General Assembly in enacting a statute, two presumptions may be employed:

> that the General Assembly does not intend to violate the Constitution of the United States or this Commonwealth and (2) that when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statues on the same subject matter intends the same constructions to be placed upon such language.

1Pa. C.S.A. §1922.[20]

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effectuate the intent of the Legislature."); Commonwealth v. Shawell, 191 A. 17, 20 (Pa. 1937), ("In construing an ambiguous statutory term, which is subject to more than one interpretation, court will adopt construction which will effectuate intention of Legislature."); In re Umholtz, 43 A.2d 75, 765 (Pa. 1899) ("Statutes are to be so construed as to best effectuate the intention of the legislature, though such construction may seem contrary to the letter.").

[19] See e.g. Commonwealth v. Pope, 317 A.2d 887, 889 (Pa. 1974) ("A statute must be construed, if possible, to give effect to all its provisions, making the entire statute effective and certain.").

[20] See e.g. Evans v. West Norriton Tp. Mun. Auth., 87

Statutes 'in pari materia' shall be construed together as one statute. 1 Pa. C.S.A. §1932. Statutes are 'in pari materia' when "they relate to the same persons or things or the same class of persons or things." 1 Pa. C.S.A. §1932. Thus, "[s]tatutes pertaining to the same subject matter are to be considered as one if possible," Girard Sch. Dist. v. Pittenger, 392 A.2d 261, 265 (Pa. 1978), and "in harmony with the existing law, and as part of a general and uniform system of jurisprudence," In re Peplinski's Estate, 29 A.2d 271, 275 (Pa. Super. 1944). Examples of statutes that have been construed as in pari materia include: Hamilton v. Unionville-Chadds Ford Sch. Dist., 714 A.2d 1012, 1015 (Pa. 1998) ("[D]istrict code and the middle school code are 'in pari materia'," because "both portion of the school codes in question relate to disciplinary procedures, and thus involves the same subject matter."); Carroll v. Ringgold Edu. Ass'n, 680 A.2d 1137, 1141 (Pa. 1996) ("Public Employee Relations Act is to be read 'in pari materia' with the addition of Article XI-A of the Public School Code, but PERA is repealed insofar as it is clearly

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A.2d 474, 478 (Pa. 1952) ("An Act of Assembly can be declared void only when it violates constitution clearly, palpably and plainly; and when Act is doubtful, and two constructions are reasonably possible, one of which will render Act unconstitutional and another unconstitutional, court should adopt construction which renders statute constitutional."); Milk Control Comm'n v. Battista, 198 A.2d 840, 843 (Pa. 1964) ("All doubt is to be resolved in favor of sustaining legislation which is sought to be upset on constitutional grounds."); Pennsylvania Liquor Control Bd. v. Spa Athletic Club, 485 A.2d 732, 735 (Pa. 1984) ("Legislation will not be invalidated unless it clearly, palpably, and plainly violates the Constitution, and any doubts are to be resolved in favor of finding of constitutionality.").

inconsistent with the addition of Article XI-A of the Act."); Girard Sch. Dist. v. Pittenger, 392 A.2d 261, 265 (Pa. 1978) ("Sections 510 et al. of the School Code and the statement of the State Board on Student Rights and Responsibilities should, in fact, be considered as 'in pari materia."); Barret v. Com., Dept. of Ed., 414 A.2d 763 (Pa. Commw. Ct. 1980) ("Article XI and Article XIX of the Public School Code were enacted contemporaneously, and 24 P.S. §19-1926, makes specific reference to the employment rights set out in Article XI. These provisions are therefore 'in pari materia' and must be construed together if possible."). Statutes 'in pari materia' should be considered concurrently and, whenever possible, effect should be given to both. First Nat'l Bank of Millville v. Horwatt, 162 A.2d 60, 62 (Pa. Super. 1960).

2. Interpretation of the RFPA - Plaintiffs' Initial Burden of Proof

The RFPA is not ambiguous as to the issues raised in this case. It defines key terms in plain language and it lays out the respective burdens of proof.

As Plaintiffs acknowledge, it is incumbent upon them to first demonstrate, by clear and convincing evidence, that Act 169 imposes a "substantial burden" by compelling conduct or expression that violates a specific tenet of their religious faith. 71 Pa. Stat. Ann. §2402(4). This is the only one of the four "substantial burdens" defined by the RFPA that Plaintiffs are claiming. Before a state agency will be held to its burden of

proving a compelling state interest and that there are no less restrictive means to further that interest, Plaintiffs must pass the "substantial burden" threshold. 71 Pa. Stat. Ann. §§2404, 2405(f).

Assuming all the averments in Plaintiffs' complaint and statements of fact are true, and giving them the benefit of all reasonable inferences, they cannot show that Act 169, on its face, burdens their exercise of religion at all, let alone substantially. As noted, all of the Plaintiffs have home schooled their children for five to thirteen years before mounting this statutory and constitutional challenge to Act 169, yet they are unable to identify any specific, concrete, direct (or indirect) effects on the practice or exercise of their religion. There is nothing in the language of Act 169 which restricts the practice of religion, nor in the regulations developed by the PDE, although the statute and the regulations take some care to accommodate religious concerns.

Since Pennsylvania's General Assembly enacted the RFPA to restore the traditional free exercise test — strict scrutiny, compelling interest, less restrictive means — that existed prior to the Smith case, it is appropriate and informative to examine the Free Exercise Clause jurisprudence on the meaning of "substantial burden" and precedent interpreting that phrase in the context of other religious freedom restoration legislation. Construing "substantial burden" as used in the federal Religious Freedom Restoration Act before it was declared unconstitutional as applied to the states, the United States District Court for the District of Maryland stated:

> A "substantial burden" exists in the Constitutional sense when governmental action compels a party to affirm a belief they do not hold, discriminates against an individual or group because of religious belief, inhibits the dissemination of particular religious views, or pressures a party to forego a religious practice. Sherbert v. Verner, 374 U.S. 398, 402-404 (1963) (collecting cases).

Battles v. Anne Arundel County Bd. of Educ., 904 F. Supp. 471, 476-77 (D.Md. 1995).

In Levitan v. Aschroft, 281 F.3d 1313, 1320 (D.C. Cir. 2003), the United States Court of Appeals for the District of Columbia Circuit held that "the First Amendment is implicated when a law or regulation imposes a substantial, as opposed to inconsequential, burden on the litigant's religious practice. Our cases make clear that this threshold showing must be made before the First Amendment is implicated. See Branch Ministries v. Rossotti, 211 F.3d 137, 142 (D.C. Cir. 2000) (holding that, to sustain its claim under either the Constitution or RFRA, a Plaintiff must first establish that its free exercise right has been substantially burdened)." The Levitan Court listed several factors to consider in determining whether a Plaintiff has met his or her "impingement threshold" as follows:

> The litigant's beliefs must be sincere and the practices at issue must be of a religious nature. See Church of the

Lukumi Babalu Aye, Inc. v. CityofHialeah, 508 U.S. 520, 531 (1993). The challenged rule must also burden a central tenet or important practice of the litigant's religion.

We are mindful of the Supreme Court's warning that judging the centrality of different religious practices is akin to "the unacceptable 'business of evaluating the relative meri's of differing religious claims.'" Smith, 494 U.S. at 887. . . . Nonetheless, it is sometimes the case that litigants can make no credible showing that the affected practice is either central or important in their religious scheme. See Henderson, 253 F.3d at 17. In such cases, the *de minimis* burden imposed by the challenged law is not constitutionally cognizable. Id. In other cases, in which the practice at issue is indisputably an important component of the litigants' religious scheme, such evidence may be relevant to overcome any claim that the impact of the challenged law is *de minimis*. Moreover, a rule that bans a practice that is not "central" to an adherent's religious practice might nonetheless impose a substantial burden, if the practice is important and based on a sincere religious belief.

A court may also consider whether the litigants' beliefs find any support in the religion to which they subscribe, or whether the litigants are merely relying on a self-serving view of religious practice. This inquiry is not a matter of deciding whether appellants' beliefs accord in every particular with the religious orthodoxy of their church. See Smith, 494 U.S. at 887, 110 S.Ct. at 1604 (holding that courts should not question the "validity of particular litigants' interpretations" of their creeds).... Nor is it a matter of adjudicating intrafaith differences in practice or belief.... Instead, a court may determine whether the litigants' views have any basis whatsoever in the creed or community on which they purport to rest their claim. For example, a Catholic litigant who asserted that it was part of his religion to wear sunglasses would be making a claim "so bizarre ... as not to be entitled to protection" under the First Amendment. [Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 715 (1981)]. The litigant's assertion of a view so totally foreign to the creed with which he claimed to affiliate might well lead the court to question his sincerity. It is therefore unlikely that a litigant challenging a rule limiting his right to wear

> sunglasses could satisfy the threshold requirement.

Levitan, 281 F.3d at 1320-21 (parallel and certain other citations omitted). See also Branch Ministries, 211 F.3d at 142-44 (collecting tax burden cases where burden on religious institutions from imposition of taxes is deemed incidental, and not substantial, for Free Exercise purposes); Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F.Supp.2d 961, 991 (N.D. Ill. 2003) ("The history of the [federal RLUIPA] statute demonstrates that Congress did not intend to change traditional Supreme Court jurisprudence on the definition of substantial burden. ... 'Substantial burden' has been defined or explained in various ways" and it exists where, for instance, the state puts substantial pressure on an adherent to modify his behavior and to violate his beliefs; the state forces a person to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning the precepts of her religion on the other; or the "government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden," quoting Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 384-85 (1990) (numerous citations omitted)).

Under the Pennsylvania RFPA, a person claiming a "substantial burden" must notify the offending state agency of the "manner in which the exercise of the governmental authority burdens the person's free exercise of religion." 71 Pa. Stat. Ann.

§2405(b)(3). The RFPA defines "substantial burden" as agency action which (1) significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs; (2) significantly curtails a person's ability to express adherence to the person's religious faith; (3) denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion; or (4) compels conduct or expression which violates a specific tenet of a person's religious faith. 71 Pa. Stat. Ann. §2403(4). The burdens contemplated by section 2403 are not abstract or theoretical; they are, instead, restrictions or impairments on a person's ability to exercise, practice, express or act in conformity with their religious beliefs. Similarly, the burdens contemplated by section 2403 concern the negative impact on one's religious exercise, practice, expressions and conduct, not "secular" concerns such as the parents' health and expenditures of time and energy.

Viewing the RFPA as a whole, according to the plain meaning of all of its terms and in accordance with the canons of construction, and considering the foregoing analysis of "substantial burden" in the context of Free Exercise Clause and similar freedom of religion restoration acts, and mindful of the General Assembly's intention to restore the traditional (pre-Smith) free exercise of religion standards, this Court holds that a Plaintiff challenging legislation or agency action under the Pennsylvania RFPA must meet the threshold burden of showing, by clear and convincing evidence, that there is or will be denial or substantial infringement

of conduct or expression which violates a specific tenet of his or her religious faith, not simply that the legislation or agency action has some *de minimus*, tangential or incidental impact or is at odds with their religious beliefs.

As will be explained more fully in the Court's discussion of the First Amendment- Free Exercise jurisprudence, Plaintiffs cannot show that Act 169, on its face, places any restriction on or infringement of the practice or exercise of their religion, but only that it interferes with their sincerely held religious beliefs that "education is religion" and that the state has no authority to regulate home education programs by such religiously motivated home schoolers. Further, Plaintiffs have not produced any evidence to demonstrate that, as applied in practice, one or more of the Defendant school districts or superintendents applies Act 169 in such a way as to restrict or infringe upon their religious practice or exercise.

B. First Amendment - Free Exercise Clause

1. Overview

As rehearsed, Employment Div., Dep't of Human Resources of Oregon v. Smith signaled a significant change in the First Amendment - Free Exercise Clause analysis of legislation claimed to infringe on the exercise of religion, in holding that the right of free exercise of religion does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability" on

the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes). Under current practice, a law ordinarily need not be justified by a compelling interest if it is "neutral" in that it is not targeted at religiously motivated conduct and "generally applicable" in that it does not selectively burden religious conduct. See Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 532-35 (1993).

It is apparent that Act 169 is a neutral law of general applicability to all Pennsylvania home schoolers and their home education programs, with no reference or special impact on religious practices, and Plaintiffs do not claim otherwise. What they claim, however, is that this legislation should be reviewed under the pre-Smith framework because it presents the "hybrid rights" exception recognized in the Smith case, as gleaned from the Meyer, Pierce and Yoder cases, since Act 169 implicates both the free exercise of their religion and another constitutionally protected fundamental right, namely the right of parents to educate their children and participate in their upbringing.

Most of the United States Circuit Courts of Appeals to address this issue have concluded that, even if the Supreme Court would explicitly recognize a "hybrid rights" exception, as their dictum in the Smith case suggests, laws regarding compulsory attendance and home schooling do not fall within that narrow exception; in other words, the Courts of Appeals have concluded that the parental rights in the education of their children, as important as they

are, do not automatically place all parents in the Meyer, Pierce and Yoder class.

2. Parental Rights — Meyer, Pierce and Yoder - Hybrid Rights

The Meyer, Pierce and Yoder trilogy of Supreme Court cases is the genesis of Plaintiffs' argument that government action which both infringes their free exercise of religion or other constitutional rights, and interferes with the rights of parents to choose the manner of education for their children and control their upbringing, must be subject to heightened scrutiny because such action impacts "hybrid rights."

It is well established that the fundamental right of parents to direct the upbringing and education of their children is protected by the Due Process Clause of the Fourteenth Amendment. Troxel v. Granville, 530 U.S. 57, 65 (2000) (recognizing that a parent's due process right in the care, custody, and control of her children is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court," and striking down Washington law giving grandparents rights of access to children in conflict with mother's parental rights); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (finding that ""primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition," and holding that Wisconsin could not compel Amish children to attend school beyond the age of 14); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (striking down Oregon law that required

parents to send their children to a public school, rather than Roman Catholic parochial school, for a period of time because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (recognizing the right of "the parent to give his children education suitable to their station in life," including right to provide education in the family's language, German). However, while the "precise boundaries of a parent's right to control a child's upbringing and education" are not fully delineated, it is "clear ... that the right is neither absolute nor unqualified." C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 182 (3d Cir. 2005).

In the Yoder case, the United States Supreme Court stated:

> [T]he First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16. Our disposition of this case, however, in no way alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when

> faced with religious claims for exemption from generally applicable education requirements. It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life.

406 U.S. at 234-35 (footnote omitted; emphasis added).

The Amish parents in the Yoder case demonstrated a "history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society," the interrelationship of their religious beliefs with their daily life, "the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others." Id. at 235. Moreover, the parents made a "convincing showing, one that probably few other religious groups or sects could make," that the alternatives offered by the state would be completely inadequate to preserve their religious way of life. Id. Still, the Court cautioned that its holding was not intended "to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and

church guidance by the Old Order Amish or others similarly situated." Id.

And in the Pierce case, the United States Supreme Court stated there is no "general power of the state to standardize its children by forcing them to accept instruction from public teachers only," that children are not mere creatures of the state, and that "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 534. Nevertheless, the Court explicitly stated:

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id. at 573.

In Runyon v. McCrary, 427 U.S. 160 (1976), the Supreme Court held that, while it can be assumed that "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have

an equal right to attend such institutions," it does not follow that such private institutions can deny black children admission solely on the basis of race in defiance of civil rights legislation. The Court easily distinguished the Meyer, Pierce, Yoder line of cases, observing that it "has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation." Runyon, 427 U.S. at 178. And in Bd. of Educ. v. Allen, 392 U.S. 236 (1968), the Court held that neither the Establishment Clause nor the Free Exercise Clause prohibited the state from loaning textbooks to students attending parochial schools, remarking that the Pierce decision did not "question Oregon's power to compel school attendance or require that the attendance be at an institution meeting State-imposed requirements as to quality and nature of curriculum," and that since that decision, "a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes." 392 U.S. at 245-47, citing with approval, People v. Turner, 263 P.2d 685, 687 (Cal. Superior Ct., App. Div. 1953), appeal

dismissed for want of substantial federal question, 347 U.S. 972 (1954).

The Turner case upheld a California statute requiring parents to place their children in public schools, a private school meeting certain prescribed conditions, or by private tutor or other person possessing requisite qualifications in the manner prescribed by statute. Home schooling parents who did not meet qualifications challenged the statute as infringing on their parental rights to educate their children, relying on the Meyer, Pierce, Yoder triology.

Rejecting the home schooling parents' argument that the statute deprived them of the right to determine how and where their children may be educated, the Superior Court, Appellate Division held:

> There can be no doubt that if the statute, without qualification or exception required parents to place their children in public schools, it would be unconstitutional.... The statute here, however, unlike that involved in the case cited, does not so provide. It recognizes the right of parents not to place their children in public schools if they elect to have them educated in a private school or through the medium of a private tutor or other person possessing certain specified qualifications. We see no basis therefore upon which to predicate a holding of

> unconstitutionality unless such a holding is compelled because the statute denies the right of parents [who do not meet statutory qualifications] to educate their children .... Contrary to the contention of the Defendant, we see nothing in the Pierce case so declaring or intimating.
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> It is not without significance that, although it has been said that 'only eleven of the forty-eight states permit by statute that instruction may be given at home by their parent or tutor,' and 'such home instruction moreover is specifically conditioned except in two states' (Parental Right in Educational Law, Loughery, Catholic University of America Press, 1952), we have been unable to find a single case in which it has been held that so-called compulsory attendance statutes are rendered unconstitutional and void merely by reason of a failure to recognize home instruction as an alternative to attendance in the public schools.

Turner, 263 P.2d 865-67.

The several United States Circuit Courts of Appeals to have considered the matter all have rejected the argument that a state's restrictions on

protected parental rights in the upbringing and education of their children, ala Meyer, Pierce, Yoder, even when combined with a free exercise of religion, due process or some other constitutional challenge, elevates their challenge to a Smith "hybrid rights" claim, or otherwise triggers heightened scrutiny. See, e.g., Crowley v. McKinney, 400 F.3d 965 (7th Cir. 2005) (non-custodial parent's rights to participate in his child's education plus free speech and equal protection claims did not trigger "hybrid rights" strict scrutiny nor trump state's interests in regulating public school education); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001) (uniform policy, even assuming that it regulated expressive conduct entitled to constitutional protection, did not violate students' First Amendment's free speech rights, did not implicate parents' fundamental due process right in the upbringing and education of their children, and was justified by a rational basis; and its opt-out procedure, which required parents with bona fide religious or philosophical objections to apply for exemption by filling out questionnaire designed to gauge the sincerity of their beliefs, did not violate free exercise and establishment clauses of First Amendment); Hooks v. Clark County Sch. Dist., 228 F.3d 1036 (9th Cir. 2000) (assuming parents have a constitutional right to educate children at home pursuant to Meyer, Pierce, Yoder, they do not have a constitutional right to state-funded speech therapy services provided to private or public schooled children; states have discretion to determine whether home education qualifies as a "private school," and the school district's refusal of IDEA services to home schoolers did not violate due

process); Swanson v. Guthrie Indep. Sch. Dist. No. 1-L, 135 F.3d 694 (10th Cir. 1998) (parents had no constitutional right "to send their children to public school on a part-time basis, and to pick and choose which courses their children will take from the public school," upholding school district's full-time attendance policy against Meyer, Pierce, Yoder parental rights and free exercise of religion challenge, and rejecting attempt to claim "hybrid rights" status); Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996) (upholding school district's mandatory community service program against Meyer, Pierce, Yoder parental rights, due process and involuntary servitude challenge); Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003) (parent's challenge to mandatory health education curriculum on religious grounds was subject to rational basis, rather than strict scrutiny, review, and did not command strict scrutiny merely because it invoked "hybrid rights," i.e., Meyer, Pierce, Yoder parental rights claim and other constitutional provisions in addition to free exercise clause); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995) (upholding compulsory high school sex education assembly program against parents' challenges that sexually explicit AIDS awareness assembly violated privacy rights and right to rear children ala Meyer, Pierce, Yoder, due process, free exercise clause and right to educational environment free from sexual harassment). See also Kissinger v. Bd. of Trustees of the Ohio State Univ., Coll. of Veterinary Med., 5 F.3d 177 (6th Cir. 1993) (where free exercise of religion combined with various other First Amendment claims, the Court of Appeals for the

Sixth Circuit explicitly rejected the more stringent "hybrid rights" legal standard suggested by the dictum in Smith, explaining that it did not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights).

The United States Court of Appeals for the Third Circuit has not explicitly decided that it would apply heightened scrutiny to "hybrid rights" challenges, but has suggested, in dictum, that a form of strict scrutiny analysis might be appropriate in a "hybrid rights" situation. Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002). The Court of Appeals applied the Smith test, stating that if "a law is 'neutral' and 'generally applicable,' and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection." Id. at 165. In a footnote, the Court observed that strict scrutiny "may also apply when a neutral, generally applicable law incidentally burdens rights protected by 'the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the rights of parents ... to direct the education of their children,' Smith, 494 U.S. at 881, 110 S.Ct. 1595 (citations omitted), but the Plaintiffs do not assert such a 'hybrid rights' claim." 309 F.3d at 165 n. 26. At least one district court within the Third Circuit has, not unreasonably, read this dictum in Tenafly as indicating the Court of Appeals for the Third Circuit will recognize and apply the "hybrid rights" heightened scrutiny analysis. Green v. Philadelphia, 2004 WL 1170531, *7 (E.D.Pa. 2004).

Late last year, the Court of Appeals for the Third Circuit upheld the authority of the state and/or its school boards to request,[21] in the immediate aftermath of the Columbine massacre, that students fill out detailed but anonymous surveys regarding the public school students' views on a host of personal matters, including sex, drug use and suicidal or antisocial behavior, against a challenge by parents that such survey violated parents' and students' Due Process right to privacy and First Amendment right against compelled expression, and parents' Due Process right to participate and control the upbringing and education of their children. C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159 (3d Cir. 2005) ("Courts have held that in certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment. "), citing with approval Swanson v. Guthrie Indep. Sch. Dist. and Brown v. Hot, Sexy and Safer Prods., Inc., inter alia. See also Parents United for Better Schools, Inc. v. Sch. Dist. of Philadelphia Bd. of Educ., 148 F.3d 260 (3d Cir. 1998) (court applied rational basis test to parents' challenge to school district's program for prevention of sexual disease raising parental rights in conjunction with other constitutional claims, although parents apparently did not raise, and Court did not address, "hybrid rights" theory).

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[21] Ostensibly, completion of the survey was to be voluntary, but the Court of Appeals agreed with the parents claim that, in practice, there was at least some coercion to fill out the forms, but that did not alter the Court's determination.

This Court need not and does not decide whether the Court of Appeals for the Third Circuit would explicitly incorporate a "hybrid rights" exception into its Free Exercise Clause analysis. As the preceding discussion shows, even where "hybrid rights" is recognized as a viable theory, Plaintiffs herein do not qualify for its application, so the general rule announced in the Smith case would prevail. Therefore, measuring Plaintiffs' First Amendment Free Exercise challenge to Act 169 under the Smith rational basis test, Act 169 passes constitutional muster as a neutral law of general applicability and effect.

Even if this Court were to apply a "hybrid rights" heightened or strict scrutiny test, however, Plaintiffs' free exercise challenge to Act 169 on its face would still fail. Every court to have considered similar challenges by parents of home schoolers to compulsory attendance laws and various regulations by school boards and districts prior to 1990, under the pre-Smith strict scrutiny regime, concluded either that the parents had not demonstrated a substantial burden, or that the state had presented compelling interests justifying such burden. See, e.g., New Life Baptist Academy v. Township of East Longmeadow, 885 F.2d 940 (1st Cir. 1989) (state's procedural requirements of religious schools designed to ensure adequate education is taking place does not violate Free Exercise or Establishment Clauses of First Amendment; collecting numerous pre-Smith cases and distinguishing Yoder; opinion by Breyer, J.); Mazanec v. North Judson-San Pierre Sch. Corp., 798 F.2d 230 (7th Cir. 1986); Murphy v. State of

Arkansas, 852 F.2d 1039 (8th Cir. 1988) (applying strict scrutiny, Arkansas Home Schooling Act did not violate Free Exercise Clause of First Amendment; distinguishing Yoder); Blackwelder v. Safnauer, 689 F.Supp. 106 (N.D.N.Y. 1988) (applying strict scrutiny, New York's Home Schooling Act did not violate Free Exercise or Establishment Clauses of First Amendment or Due Process Clause of Fourteenth Amendment; collecting numerous cases and finding compelling state interests in such regulations); State of Ohio v. Schmidt, 505 N.E.2d 627 (Ohio 1987) (applying strict scrutiny, Ohio's Home Schooling Act did not violate Free Exercise Clause of First Amendment; collecting numerous cases and finding compelling state interests in such regulations); Care and Protection of Charles, 504 N.E.2d 592 (Mass. 1987) (applying strict scrutiny, Massachuset's Home Schooling Act did not violate Free Exercise Clause of First Amendment; collecting numerous cases and finding compelling state interests in such regulations).

States have employed a variety of techniques and procedural requirements of different intensity in crafting home education programs that would permit home schoolers to satisfy compulsory education laws and ensure that the students were receiving adequate education. Where a court has reached the compelling state's interests and less restrictive means portions of the test, the burden on parental rights in this context routinely has been found to be justified, as the above cited cases amply illustrate.

For all of the foregoing reasons, this Court reaffirms the denial of Plaintiffs' Motion for

Summary Judgment as to their "facial" challenge to Act 169 as a violation of their right to freely exercise their religion, and will grant Defendants' Motion for Summary Judgment as to Plaintiffs' "as applied" challenges.

C. Remaining Constitutional Challenges

The Court will also grant summary judgment for Defendants on Plaintiffs' remaining constitutional challenges to Act 169 — that it violates the Establishment Clause of the First Amendment; several aspects of the Due Process Clause of the Fourteenth Amendment; and the Free Speech Clause of the First Amendment (including their right to resist "compelled speech"). As Plaintiffs' position as stated in two rounds of summary judgment manifests, these consolidated cases are principally about the RFPA and the Free Exercise Clause of the First Amendment. The cases discussed in the preceding section illustrate that each of Plaintiffs' additional constitutional claims are frequently joined with free exercise claims in the parental rights - compulsory education arena, and the analysis and resolution of the claims substantially overlap. Those additional challenges fare no better in the parental rights - compulsory education arena than do their free exercise claims. Accordingly, the Court will not elaborate its rulings on these additional challenges, and will grant summary judgment in favor of Defendants on Plaintiffs' remaining constitutional claims.

VI. Summary A. The Summary Judgment Rulings

Defendants assert, and offer documentary and testimonial evidence to support, that none of the school districts have ever rejected a home schooling plan for including or emphasizing religious education, or interfered with the education of the home schooling children in this case, whether religious based or secular; none of the school districts have ever required particular educational texts and materials, disapproved of any texts or materials actually used, such as Bibles, disapproved any portfolio submitted by any of the Plaintiffs, or interfered in any way with the choice of educational texts and materials to be used at home; none of the school districts have ever interfered or attempted to regulate or oversee any of the children's or parents' religious practices, such as participation in the observance of sacraments and other customs; none of the school districts have ever rejected or disqualified any certifications by a home schooling third party evaluator (as some of the parents use) that "appropriate education" has taken place because of the evaluator's religious affiliation or beliefs, nor have any of the school districts ever disapproved of the "appropriate education" certification of any of the Plaintiffs' chosen evaluator.

Plaintiffs concede these undisputed facts, but nevertheless maintain that the school districts' insistence on compliance with Act 169 has imposed a substantial burden on their religion, and has infringed upon their other constitutional and statutory rights. Plaintiffs assert that Defendant

school districts substantially burden their religious practices because the mere fact of regulating the education of their children transgresses parents' "Biblical jurisdiction" over education, as commanded by God, requiring them to violate their religious beliefs and sin in the eyes of The Lord.

Plaintiffs' Memorandum in Opposition to Summary Judgment (Document No. 104) does not attempt to state a case that the implementation of Act 169 by Defendant school districts causes actual, tangible interference with any religious practice or infringes upon their conduct or exercise of religion in anyway. Instead, Plaintiffs candidly admit that they "write only to respectfully address our specific disagreements with the [December 8, 2005] memorandum opinion's analysis with respect to the issue of 'substantial burden.'" Plaintiffs' Memorandum in Opposition to Summary Judgment (Document No. 104) at 1-2.

Framed in those terms, all of Plaintiffs' challenges to Act 169 and its implementation by Defendant school districts must fail. After full and adequate opportunity to take depositions and gather evidence to develop the record, Plaintiffs still have not shown that Act 169, either "on its face" or "as applied," places any restriction on or infringement upon the practice or exercise of their religion, but only that it interferes with their sincerely held religious beliefs that "education is religion" and that the state has no authority to regulate home education programs by such religiously motivated home schoolers. As discussed above at length, this does not constitute a burden, let alone a substantial

one, on the freedom to practice their religion, and so the Plaintiffs fail to meet their threshold burdens under the RFPA or the First Amendment. Accordingly, the Court will grant summary judgment in favor of the Defendants and against Plaintiffs, and an appropriate order will be entered.

B. Role of Judiciary

Although parents and guardians have the primary and crucial role in the upbringing of and choice of education for their children, the state has a secondary, yet substantial, role to play, and has since the founding of our Nation. The Pennsylvania Constitution has provided for public education since 1776, and currently directs the General Assembly to "provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const., Art. III, § 14.

Implementing its constitutional mandate, the Pennsylvania General Assembly has created a system of public education and compulsory attendance, and has authorized four alternative means of satisfying the compulsory attendance law, including under Act 169, Pennsylvania's Home Schooling Act. Act 169 does not require or prohibit any particular content in textbooks, courses, curriculum or other educational materials, but merely requires instruction for a minimum amount of time and days, in certain specific courses deemed necessary by the legislature, with procedures for demonstrating compliance.

While it may be true, as Plaintiffs herein argue, that other states have no procedures concerning home schoolers or simpler and less time consuming procedures for home schooling parents and guardians to provide the necessary assurances of adequate education to the state, it is not the role of the judiciary to substitute its judgment, or the judgment of elected or non-elected officials of other states, for the wisdom of the elected legislative body who crafted the procedures for the Commonwealth of Pennsylvania. In fact, the Pennsylvania General Assembly has accommodated home schooling parents by statute, subject to statutory requirements, thus ensuring that home schooling would satisfy the Compulsory Attendance Law even over possible objections by local school board, school administrator or the PDE. Further, the Pennsylvania RFPA is always available to parents and guardians should any local school board, school administrator or the PDE attempt to regulate educational content, textbooks, curriculum and instructional materials on the basis of religious content, or otherwise attempt to apply or interpret Act 169 in a manner that impacts the exercise, practice, conduct or expression of religion. On the record before the Court, however, there is no evidence that any school district or administrator has acted in such a manner.

This Court should not function as a super school board, questioning the effectiveness of the procedures crafted by the duly elected representatives of the citizens of Pennsylvania, nor may the Court substitute its opinion for the collective wisdom of the General Assembly as to

what is "appropriate education" or what are the best procedures to achieve the constitutional mandate of providing a thorough and efficient system of public schools. Those decisions are within the legislative prerogative. This Court's role is, instead, the substantially more circumscribed one of measuring the decisions made by the legislature against the protections afforded by the Constitution of the United States and by governing statutes.

For the reasons set forth above, this Court finds that Act 169 does not, on its face, violate the Free Exercise, Establishment, or Free Speech Clauses of the First Amendment to the Constitution of the United States, the Due Process Clause of the Fourteenth Amendment, or the Pennsylvania Religious Freedom Protection Act, and that Plaintiffs have not offered any evidence to support their claims that implementation of Act 169 "as applied" to their home education programs infringe those rights.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All Counsel of Record

ENTERED December 8, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELECTRONICALLY FILED

04cv1599 LEAD
Consolidated for Purpose of Pretrial Proceedings with 04-1670, 04-1932, 04-1936, 05-70(E), 05-203(J)

MR. DARRELL COMBS, and
MRS. KATHLEEN COMBS,
Plaintiffs,

v.

HOMER CENTER SCHOOL DISTRICT, and
JOSEPH F. MARCOLINE, in his official capacity as Superintendent of Homer-City School District,
Defendants.

DR. THOMAS PREVISH AND
TIMARI PREVISH,
Plaintiff, 04cv1670

v.

NORWIN SCHOOL DISTRICT, and
RICHARD WATSON, in his official capacity as Superintendent of Norwin School District,
Defendants.

DR. MARK NEWBORN, and
MRS. MARY ALICE NEWBORN,
Plaintiffs, 04cv1932

v.

FRANKLIN REGIONAL SCHOOL
DISTRICT, and
STEPHEN VAK, in his official capacity as
Superintendent of Franklin Regional School District,
Defendants.

MR. THOMAS HANKIN, and
MRS. BABETTE HANKIN,
Plaintiffs, 04cv1936

v.

BRISTOL TOWNSHIP SCHOOL DISTRICT, and
REGINA CESARIO, in her official capacity as
Superintendent of Bristol Township School District,
Defendants.

MR. DOUGLAS NELSON and
MRS. SHARI NELSON,
Plaintiffs, 05cv0070 (Erie)

v.

TITUSVILLE AREA SCHOOL DISTRICT, and JOHN D. REAGLE, in his official capacity as Acting Superintendent of Titusville Area School District,

Defendant.

REV. STEVEN WEBER AND MRS. MEG WEBER,

Plaintiffs, 05cv203 (Johnstown)

v.

DUBOIS AREA SCHOOL DISTRICT, and SHARON KIRK, in her official capacity as Superintendent of Dubois Area School District,

Defendants.

MEMORANDUM OPINION

December 8, 2005

I. Introduction

The Commonwealth of Pennsylvania's education system, enacted by its General Assembly (as opposed to the Pennsylvania Department of Education ("PDE") or local school boards or administrators), permits parents and guardians to satisfy Pennsylvania's compulsory education laws through "home education programs," subject to minimum days of attendance and hours of instruction in certain specific courses (e.g., language, geography, literature, history) and review by the

respective school districts of logs and educational materials compiled by the supervisors of the home education programs for compliance with the required courses and minimum days and hours of instruction, but not of educational content, textbooks, curriculum or instructional materials.

Parents who home school their children based on their sincerely held religious beliefs have sued their respective school districts and superintendents in several state and federal courts in the Commonwealth of Pennsylvania, seeking a declaratory judgment and equitable relief from the enforcement of Pennsylvania's Compulsory Attendance Law through truancy prosecutions on the grounds that Pennsylvania's statute permitting "home education programs" violates the Pennsylvania Religious Freedom Protection Act, the Free Exercise, Establishment and Free Speech Clauses of the First Amendment to the Constitution of the United States, and several aspects of the Due Process Clause of Fourteenth Amendment to the Constitution of the United States, both on its face and as applied.

Resolution of plaintiffs' pending motion for summary judgment on "threshold issues" requires careful consideration and balancing of often competing personal, societal and governmental interests — the rights of parents and guardians to direct the education and upbringing of their children and the constitutional and statutory obligation of the Commonwealth to provide for and ensure the adequate education of its children citizens — and

constitutional principles that are basic to our Nation's concept of ordered liberty and democracy.

II. The Pennsylvania Constitutional and Statutory Framework

A. Education in American History in General, and in the Commonwealth of Pennsylvania in Particular

1. American History

An educated citizenry has been recognized as critical to the success and well-being of the Nation and its people from the time of its creation. Founding fathers, including George Washington, John Adams, Thomas Jefferson and, in the Commonwealth of Pennsylvania, William Penn, championed the view that the government has an overarching responsibility to create and to regulate a system of public education.

In his farewell address in 1796, America's first president, George Washington, addressed the issue of public education provided by the government. "Promote then, as an object of primary importance, institutions for the general diffusion of knowledge. ... In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened."[1] John Adams agreed that the government was obligated to educate its

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[1] The Avalon Project at Yale Law School, Washington's Farewell Address 1796, www.yale.edu/lawweb/Avalon/washing.htm.

citizens. In 1780, Adams engrafted that principle into the Massachusetts' Constitution, which stated: "[I]t shall be the duty of the legislatures and magistrates, in all future periods of the Commonwealth, to cherish the interests of ... public school and grammar schools in the towns."[2]

And, serving in Virginia's state legislature, Thomas Jefferson proposed legislation in the fall of 1778 to create a public school system in Virginia. Jefferson titled this measure A Bill for the More General Diffusion of Knowledge.[3] "For Thomas Jefferson, public education was the key to preserving republican government."[4] Jefferson believed every citizen should have access to public education because the "most effectual means of preventing [public corruption] would be, to illuminate, as far as practicable, the minds of the people at large."[5]

The Massachusetts Bay Colony was the first American colony to pass a compulsory education law. In 1642, Massachusetts required parents to see that their children received an education, and five years later, the legislature passed a law which established

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[2] Dave Wieneke, Education Time Line: 400 Years in Education, Mass. Gov. interactive website, www.mass.gov/statehouse/1700.htm.

[3] Thomas Jefferson Exhibits, www.loc.gov/exhibits/jefferson/jeffrep/html., United States Library of Congress website.

[4] Id.

[5] Id.

public schools in some towns, and provided for the appointment of teachers and collection of taxes to pay for the education of children.[6] Connecticut was the next colony to pass a public school law in 1650, requiring all "masters of families" to educate their children and servants.[7]

2. Pennsylvania History

Before any of these notables had placed their imprimaturs on public education as a foundation of good government and a robust Nation, William Penn had advocated for a system of public schools in Pennsylvania,[8] as did other prominent leaders of the Commonwealth.[9] In 1681, Penn was granted the colony by the King of England. He drafted a Frame

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[6] Kern Alexander and M. David Alexander, American Public School Law, 22 (1998).

[7] Id.

[8] The Avalon Project at Yale Law School, Frame of Government of Pennsylvania, May 5, 1682, www.yale.edu/lawweb/avalon/states/pa04.htm. See generally Louise Gilchrise Walsh and Matthew John Walsh, History and Organization of Education in Pennsylvania, 20-21, 40-45, 59(1928).

[9] Benjamin Franklin and Benjamin Rush, for example. James Pyle Wichersham, A History of Education in Pennsylvania Private and Public, Elementary and Higher, 58 (1886) (on Franklin's advocacy for public education); Alyn Brodsky, Benjamin Rush Patriot and Physician, 296 (2004) (Rush wrote an article in 1787 for the Philadelphia Independent Gazette entitled, "To the Citizens of Philadelphia: A Plan for Free Schools," which called for the creation of schools for all children no matter their age, social status, or religious background).

of Government for the new Commonwealth, which included a provision for public education, stating: "Twelfth. That the Governors and Provincial Council shall erect and order all Public Schools, and encourage and reward authors of useful sciences and laudable inventions in the said Province."[10]

At Penn's urging, in 1682 the First General Assembly of Pennsylvania created the "Great Law" which included a provision for the creation of schools across Pennsylvania.[11] Then, at the Second General Assembly in 1683, stronger public school legislation was passed under Penn's leadership. In Chapter CXII, this legislation stated:

> And to the end that poor as well as rich man be instructed in good and commendable learning, which is to be preferred before wealth, Be it enacted,... [t]hat all persons in this Province and Territories thereof, having children, and all the guardians and trustees of orphans, shall cause such to be instructed in reading and writing . . . , and that then they be taught some useful trade or skill, that the poor may work to live, and the rich if they become poor may not want: of which every County court shall take care. And in case such parents, guardian, or overseers shall be found deficient in

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[10] Wichersham, at 33.

[11] Id., at 38.

> this respect, every such parent, guardian, or overseer shall pay for ever such child, five pounds, except there should appear an incapacity in body or understanding to hinder it.[12]

In 1776, the Commonwealth of Pennsylvania passed a provisional state constitution which included the following provision for public education: "A school or schools shall be established in each county by the legislature for the convenient instruction of youth, with such salaries to the masters paid by the public as may enable them to instruct youth at low prices; and all useful learning shall be duly encouraged and promoted in one or more Universities."[13] In one form or another, provisions for public education were set forth in the various state constitutions, culminating in the formulation contained in the Pennsylvania Constitution of 1874, to wit: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years shall be educated, and shall appropriate at least one million dollars each year for that purpose." Pa. Const. of 1874, Art. X, § 1. As amended in 1967, this proviso now reads: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const., Art. III, § 14.

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[12] Id., at 39.

[13] Id., at 256.

The Pennsylvania Constitution of 1790 was the basis for the Free Public School Act of 1834 which is the underpinning for today's system of schools in the Commonwealth. 22 Pa. Code, Chap. 4, Appx. C, Academic Standards for Civics and Government, XIV. "In meeting its responsibility, the General Assembly has established a comprehensive legislative scheme governing the operation and administration of public education." Pennsylvania Fed'n of Teachers v. Sch. Dist. of Phila., 506 Pa. 196, 484 A.2d 751, 753 (1984).

The structure of Pennsylvania's public school system was summarized by the United States Court of Appeals for the Third Circuit recently in Parents United For Better Schools, Inc. v. Sch. Dist. of Philadelphia Bd. of Educ., 148 F.3d 260, 262 n.1 (3d Cir. 1998):

> The organization of [Pennsylvania's] public school system is controlled by the Public School Code of 1949 (School Code)[24 Pa. Stat. Ann. §§ 1-101--27-2702 (West 1992)]." Philadelphia Fed'n of Teachers, Local No. 3 v. Board of Educ. of the Sch. Dist. of Phila., 51 Pa.Cmwlth. 296, 414 A.2d 424, 426 (1980) (citation omitted). "School Districts act as agencies of the state legislature in administering the educational program within the district." Chambersburg Area Sch. Dist. v. Pennsylvania Labor Relations Bd., 60 Pa.Cmwlth. 29, 430 A.2d 740, 743 (1981) (citation omitted), appeal

> dismissed, 498 Pa. 366, 446 A.2d 603 (1982). See also Barth v. School Dist. of Phila., 393 Pa. 557, 143 A.2d 909, 912 (1958) ("the School District of Philadelphia is an agent or creature of the Legislature"); Kaufman v. Central Susquehanna Intermediate Unit No. 16, 144 Pa.Cmwlth. 163, 601 A.2d 412, 414 (1991) ("The legislature has established that each school district and intermediate unit shall have, inter alia, a board of directors and has set forth the powers and duties of each") (citation omitted).

The following laws were enacted to implement Pennsylvania's constitutional mandate to provide a thorough and efficient system of public education to serve the needs of the citizens of the Commonwealth. Pa. Const., Art. III, § 14.

B. Pennsylvania Compulsory Education Law and Four Legislative Educational Options

The Commonwealth of Pennsylvania requires every child of compulsory school age having legal residence in Pennsylvania "to attend a day school in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language." 24 Pa. Stat. Ann. §13-1327(a). Compulsory school age is defined by the Pennsylvania Administrative Code as "the period of a child's life from the time the child enters school as a beginner which may be no later than at the age of

eight (8) years, until the age of seventeen (17) or graduation from a high school, whichever occurs first." 22 Pa. Code §11.13 (2005).

The Pennsylvania legislature currently permits four alternative categories or types of education that may satisfy the Compulsory School Law: (1) public schools, with certain trade school options, 24 Pa. Stat. Ann. §13-1327(a); (2) non-public, licensed private academic schools, 24 Pa. Stat. Ann. §13-1327(a); (3) schools operated by bona fide churches or other religious bodies, 24 Pa. Stat. Ann. §13-1327(b); and (4) "home education programs," 24 Pa. Stat. Ann. §13-1327.1.

First, parents and guardians may fulfill the compulsory attendance requirements by sending their children to public schools. In lieu of such attendance, any child who is fifteen years of age may enroll as a day student in a private trade school or in a private business school licensed by the Pennsylvania Department of Education provided he or she obtains the approval of the district superintendent and Secretary of Education. 24 Pa. Stat. Ann. §13-1327(a). Similarly, any child sixteen years of age may enroll as a day student in a private trade school or in a private business provided he or she obtains the approval of the district superintendent. 24 Pa. Stat. Ann. § 13-1327(a). Thus, even though a child may opt to attend a private trade or business school, every

> parent, guardian, or other person having control or charge of any child or children of compulsory school age is

> required to send such child or children to a day school in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language.

24 Pa. Stat. Ann. §13-1327(a).

The second option enacted to ensure "appropriate education" of the children of the Commonwealth is private schools. The certificate of any principal or teacher of a private school, or of any institution for the education of children, "in which the subjects and activities prescribed" by the State Board of Education are taught in the English language, must set forth that the work of said school is in compliance with the provisions of the Compulsory Attendance Law. 24 Pa. Stat. Ann. §13-1327(a). With respect to instruction in the English language, instruction by a properly qualified private tutor shall be considered as complying with the Compulsory Attendance Law. 24 Pa. Stat. Ann. § 13-1327(a). A properly qualified private tutor is defined as "any person who is certified by the Commonwealth of Pennsylvania to teach in the public schools of Pennsylvania." 24 Pa. Stat. Ann. §13-1327(a).

The third alternative permits education at parochial and other religious affiliated schools run by bona fide churches and other religious bodies. The principal of each such school must submit a notarized affidavit to the Pennsylvania Department of Education, stating that the mandated subject

matter is offered in the English language and that such school is otherwise in compliance with the provisions of the Compulsory Attendance Law. 24 Pa. Stat. Ann. §13-1327(b). Thus,

> a school operated by a bona fide church or other religion body and the parent, guardian or other person having control or charge of any such child or children of compulsory school age shall be deemed to have meet the requirements of this section if that school provides a minimum of one hundred eight (180) days of instruction or nine hundred (900) hours of instruction per year of instruction at the secondary level.

24 Pa. Stat. Ann. §13-1327(b).

Furthermore, a school operated by a bona fide church or religious body must provide instruction in the following subjects at the elementary level:

> English, to include spelling, reading, and writing; arithmetic; science; geography; history of the United States and Pennsylvania; civic; safety education, including regular and continuous instruction in the dangers and prevention of fires; health and physiology; physical education; music; and art.

24 Pa. Stat. Ann. §13-1327(b)(1).

And at the secondary level, such schools must provide instruction in:

> English, to include language, literature, speech and composition; science, to include biology and chemistry; geography; social studies, to include civics, economics, world history, history of the United States and Pennsylvania; a foreign language; mathematics, to include general mathematics and statistics, algebra and geometry; music; physical education; health and physiology; and safety education, including regular and continuous instruction in the dangers and prevention of fires.

24 Pa. Stat. Ann. §13-1327(b)(2).

Although the subject areas to be taught in schools operated by a bona fide church or religious body are prescribed by statute, it is "the policy of the Commonwealth to preserve the primary right and the obligation of the parent or parents, or person or persons in loco parentis to a child, to choose the education and training for such child." 24 Pa. Stat. Ann. §13-1327(b). Accordingly, nothing contained in the Compulsory Attendance Law "shall empower the Commonwealth, any of its officers, agencies or subdivisions to approve the course content, faculty, staff or disciplinary requirements of any religious school referred to in this section without the consent of said school." Id.

C. Act 169 of 1988 - Pennsylvania Home Schooling Act

The Pennsylvania legislature recognized and permitted the fourth alternative in 1988 - Pennsylvania's Home Schooling Act, Act 169 of 1988, P.L. 1321, No. 169, December 1, 1988, 24 Pa. Stat. Ann. §13-1327.1. Act 169 provides that instruction to children of compulsory school age in a "home education program" satisfies Compulsory Attendance Law. 24 Pa. Stat. Ann. §13-1327.1(d). Act 169 requires the same number of days and hours of instruction, and the same subject matters of instruction as required by a school operated by a bona fide church or religious body. 24 Pa. Stat. Ann. §13-1327.1(c)(1)(2). To begin a home education program, the parent or guardian of the child must file a notarized affidavit prior to the commencement of the home education program, and annually thereafter on August 1, with the superintendent of the school district of residence. 24 Pa. Stat. Ann. § 13-1327.1(b)(1). This affidavit must set forth:

> [T]he name of supervisor of the home education program who shall be responsible for the provision of instruction; the name and age of each child ...; the address and telephone number of the ... site; that such subjects as required by law are offered in the English language, including an outline of proposed education objectives by subject area.

24 Pa. Stat. Ann. §13-1327.1.

The outline of proposed education objectives cannot be utilized by the district superintendent in determining whether the home education program is in compliance. 24 Pa. Stat. Ann. §13-1327.1(b)(1). However, the superintendent is charged with ensuring that "appropriate education" is taking place; "appropriate education" is "a program consisting of instruction in the required subjects for the time required in this act and in which the student demonstrates sustained progress in the overall program." 24 Pa. Stat. Ann. §13-1327.1(a).

In order to ensure that "appropriate education" is occurring, the supervisor of the home education program must submit to the district superintendent a portfolio of records and materials, as follows:

> (1) A portfolio of records and materials. The portfolio shall consist of a log, made contemporaneously with the instruction, which designates by title the reading materials used, samples of any writings, worksheets, workbooks or creative materials used or developed by the student and in grades three, five and eight results of nationally normed standardized achievement tests in reading/language arts and mathematics or the results of Statewide tests administered in these grade levels. The department shall establish a list . . . of nationally normed standardized tests from which the supervisor . . . shall select. . . if the

supervisor does not choose the Statewide tests. At the discretion of the supervisor, the portfolio may include the results of nationally normed standardized achievement tests for other subject areas or grade levels. The supervisor shall ensure that the nationally normed standardized tests or the Statewide tests shall not be administered by the child's parent or guardian.

* * *

(2) An annual written evaluation of the student's educational progress as determined by a licensed clinical or school psychologist or a teacher certified by the Commonwealth or by a [qualified] nonpublic school teacher or administrator. . . . The evaluation shall also be based on an interview of the child and a review of the portfolio required in clause (1) and shall certify whether or not an appropriate education is occurring. At the request of the supervisor, persons with other qualifications may conduct the evaluation with the prior consent of the district of residence superintendent. In no event shall the evaluator be the supervisor or their spouse.

24 Pa. Stat. Ann. § 13-1327.1(e)(1)(2).

If at any time during the school year, the district superintendent has a reasonable belief that appropriate education may not be occurring in a home education program, the superintendent may require documentation pertaining to the portfolio of records and materials to be submitted. 24 Pa. Stat. Ann. § 13-1327.1(h). After reviewing the submitted documentation, if the district superintendent believes that appropriate education is not taking place, either during or at the conclusion of the school year, he or she shall notify the supervisor of the home education program by certified mail, stating such belief and specifying the aspects of the documentation deemed inadequate. 24 Pa. Stat. Ann. §13-1327.1(i). The supervisor of the home education program shall then have twenty (20) days to submit additional documentation demonstrating that appropriate education is occurring. 24 Pa. Stat. Ann. § 13-1327.1(j). If this additional documentation is not forwarded to the district superintendent, the home education program will be declared out of compliance, and as a consequence, the child must be "enrolled in the public school district of residence or a nonpublic school or a licensed private academic school," and the supervisor or spouse of the supervisor shall not be eligible to supervise a home education program for that child for twelve months. 24 Pa. Stat. Ann. § 13-1327.1(j).

If additional documentation is submitted and the district superintendent still determines that appropriate home education is not occurring, he must notify the supervisor of the home education program and the board of school directors must then provide for a "proper hearing by a duly qualified and

impartial hearing examiner within thirty days." 24 Pa. Stat. Ann. §13-1327.1(k). The hearing examiner "shall not be an officer, employee or agent of the PDE or of the school district or intermediate unit of residence of the child in the home education program." 24 Pa. Stat. Ann. §13-1327.1(a). If the hearing examiner "finds that the documentation does not indicate that appropriate education is taking place in the home education program, the home education program for the child shall be out of compliance with the requirements of this section and section 1327, and the student shall be promptly enrolled in the public school district of residence or a nonpublic school or a licensed private academic school " 24 Pa. Stat. Ann. §13-1327.1(k). Either the supervisor of the program or the superintendent for the school district may appeal the decision of the hearing examiner to the Secretary of Education (the executive branch) or to the Commonwealth Court of Pennsylvania (the judicial branch). Id.

D. Pennsylvania Administrative Code and Protections of Religious Beliefs

The Pennsylvania Department of Education, headed by the Secretary of Education, is charged by the General Assembly with developing rules and regulations to carry out its legislative enactments as set forth in the Pennsylvania School Code. Act of July 23, 1969, P.L. 181, § 1, 71 Pa. Stat. Ann. §§1037, 1038; Act of June 16, 1994, P.L. 319, No. 49, § 9, 64 Pa. Stat. Ann. §468. The Administrative Code provides the following regulations that are pertinent to compulsory education and home education programs.

The PDE explains that public education "prepares students for adult life by attending to their intellectual and developmental needs and challenging them to achieve at their highest level possible. In conjunction with families and other community institutions, public education prepares students to become self-directed, life-long learners and responsible, involved citizens." 22 Pa. Code §4.11(b). Thus, public education is intended to provide opportunities for students to:

> (1) Acquire knowledge and skills. (2) Develop integrity. (3) Process information. (4) Think critically. (5) Work independently. (6) Collaborate with others. [and] (7) Adapt to change.

22 Pa. Code §4.11(c).

Academic standards "describe the knowledge and skills which students will be expected to demonstrate before graduating from a public school," and are set forth in section 4.12, 22 Pa. Code §4.12, while "assessment in public education" is designed to determine student attainment of state and local academic standards. 22 Pa. Code §4.11(d-e). To that end, public schools "provide instruction throughout the curriculum so that students may develop knowledge and skills in the following areas: (1) Reading, writing, speaking and listening; (2) Mathematics; (3) Science and technology; (4) Environment and ecology; (5) Social studies (civics and government, geography, economics and history); (6) Arts and humanities; (7) Career education and work; (8) Health, safety and physical education; (9)

Family and consumer science; and (10) World languages. 22 Pa. Code §4.11(g)(1-10). Notably, religious instruction and training is omitted from the statutory and administrative objectives and curriculum.

The Code also defines "Planned instruction" as consisting of "at least the following elements: (1) Objectives of a planned course, instructional unit or interdisciplinary studies to be achieved by all students; (2) Content, including materials and activities, and estimated instructional time to be devoted to achieving the academic standards. Courses, instructional units or interdisciplinary studies of varying lengths of time maybe taught; (3) The relationship between the objectives of a planned course, instructional unit or interdisciplinary studies and academic standards specified under § 4.12 and to those determined in the school district's (including charter schools) or AVTS's strategic plan under § 4.13; and (4) Procedures for measurement of the objectives of a planned course, instructional unit or interdisciplinary studies." 22 Pa. Code §4.11(h).

"Students of compulsory school age participating in a home education program are subject to sections 1327(d) and 1327.1 of the Public School Code of 1949 [24 Pa. Stat. Ann. §§ 13-1327(d) and 1327.1]." The Code provides that school district approval is not required to commence home education programs. 22 Pa. Code § 11.31(a). For purposes of the Pennsylvania State Higher Education Grant Program, "an approved secondary school shall also include any home education program that is accredited by any home schooling

accreditation agency approved by the Department of Education. If the home education program lacks the requisite accreditation, certification by the appropriate local school official attesting that the home education program is in compliance with Section 1327.1 of the Public School Code of 1949 [24 Pa. Stat. Ann. §13-1327.1] shall be submitted to the Agency by the appropriate local school official." 22 Pa. Code §121.21(c).

The Pennsylvania Administrative Code mandates that school districts adopt policies that preserve certain religious rights for parents and guardians of children of compulsory school age. First, children shall be "excused from specific instruction which conflicts with the religious beliefs of their parents upon receipt of a written request to the school district." 22 Pa. Code. §4.4(d)(3). Second, if "upon inspection of State assessments parents or guardians find the assessments in conflict with their religious belief and wish their student be excused from the assessment, the right of the parents or guardians will not be denied upon written request to the applicable school district superintendent." 22 Pa. Code §4.4(d)(4).

The PDE also maintains a website [http://www.pde. state.pa.us/home_education] devoted to home education, which contains the text of Act 169, a list of frequently asked questions about home schooling and compliance with Act 169, sample forms and affidavits, acceptable tests, academic standards, and links to various resources available to assist home schooling parents, guardians and supervisors.

E. Pennsylvania Religious Freedom Protection Act

In 2002, the Pennsylvania General Assembly enacted the Religious Freedom Protection Act ("RFPA"), P.L. 1701, No. 214, Dec. 9, 2002, 71 Pa. Stat. Ann. §§2401-2407, described as "An Act protecting the free exercise of religion; and prescribing the conditions under which government may substantially burden a person's free exercise of religion." 71 Pa. Stat. Ann. §2401. The RFPA was predicated on the following legislative findings:

> (1) Laws and governmental actions which are facially neutral toward religion, as well as laws and governmental actions intended to interfere with religious exercise, may have the effect of substantially burdening the free exercise of religion. However, neither State nor local government should substantially burden the free exercise of religion without compelling justification.
>
> (2) The General Assembly intends that all laws which it has heretofore enacted or will hereafter enact and all ordinances and regulations which have been or will be adopted by political subdivisions or executive agencies shall be construed so as to avoid the imposition of substantial burdens upon

> the free exercise of religion without compelling justification.

71 Pa. Stat. Ann. §2402.

The RFPA provides that an "agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability," unless the "agency proves, by a preponderance of the evidence, that the burden is (1) In furtherance of a compelling interest of the agency, and is (2) The least restrictive means of furthering the compelling interest." 71 Pa. Stat. Ann. §2404.

The RFPA permits a person whose free exercise of religion has been burdened to assert the violation against the agency as a claim or defense in any judicial proceeding. 71 Pa. Stat. Ann. §2405(a). Barring certain exigent circumstances not asserted herein, 71 Pa. Stat. Ann. §2405(c), prior to raising such a claim or defense, the person must provide written notification, by certified mail, return receipt requested, informing the agency that:

> (1) The person's free exercise of religion has been or is about to be substantially burdened by an exercise of the agency's governmental authority.
> (2) A description of the act or refusal to act which has burdened or will burden the person's free exercise of religion.

> (3) The manner in which the exercise of the governmental authority burdens the person's free exercise of religion.

71 Pa. Stat. Ann. §2405(b)(1-3).

If a person asserting a claim or defense in accordance with the RFPA "proves, by clear and convincing evidence, that the person's free exercise of religion has been burdened or likely will be burdened," a court "may award the person such declaratory or injunctive relief as may be appropriate." 71 Pa. Stat. Ann. §2405(f). The awarding of monetary damages is strictly prohibited; attorney's fees may only be awarded when the actions of the agency were vexatious or dilatory. 71 Pa. Stat. Ann. §2405(f).

The RFPA applies "to any State or local law or ordinance and implementation of that law, whether statutory or otherwise and whether adopted or effective prior to or after the effective date of this act." 71 Pa. Stat. Ann. §2406(a). Furthermore, the application of the RFPA shall not "be construed to authorize any government to prohibit or penalize the holding of any religious belief or to take any action contrary to the Constitution of the United States or the Constitution of Pennsylvania." 71 Pa. Stat. Ann. §2407.

The General Assembly has provided definitions for some of the critical terms of the RFPA, as follows:

"Free exercise of religion." The practice or observance of religion under section 3 of Article I of the Constitution of Pennsylvania.

"Person." An individual or a church, association of churches or other religious order, body or institution which qualifies for exemption from taxation under section 501(c)(3) or (d) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 501).

"Substantially burden." An agency action which does any of the following:

(1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs.

(2) Significantly curtails a person's ability to express adherence to the person's religious faith.

(3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion.

(4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

71 Pa. Stat. Ann. §2403.

Article I, Section 3 of the Pennsylvania Constitution provides that "all men have a natural

and indefeasible right to worship Almighty God according to the dictates of their own conscience," that "no man can be compelled to attend, erect, or support anyplace of worship or to maintain any ministry against his own consent," and that no human authority can interfere with the "rights of conscience and no preference shall ever be given by law to any religious establishment or modes of worship." Pa. Const., Art. I, §3.

F. Historical and Legislative Background of the Pennsylvania Religious Freedom Protection Act

It is important to understand the historical and legislative background of the RFPA, to place it in proper context and to inform this Court's statutory interpretation of the RFPA and to properly resolve the statutory and constitutional challenges to Act 169, the home schooling statute.

Prior to 1990, legislation challenged under the Free Exercise Clause of the First Amendment was subjected to a strict scrutiny analysis. See Sherbert v. Verner, 374 U.S. 398 (1963). Under this test, laws which had the effect of substantially burdening the practice of a person's religion were declared an unconstitutional infringement on the free exercise of religion unless the state could show a compelling interest justifying the legislation, and that there were no less restrictive ways to further that interest. Id. at 402-404; see also Hernandez v. Commissioner, 490 U.S. 680 (1989) (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult).

In 1990, the Free Exercise Clause landscape changed significantly with Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). In the Smith case, the United States Supreme Court held that the Free Exercise Clause did not prohibit application of Oregon's drug laws to the ceremonial ingestion of peyote, and thus, the state could, consistent with that clause, deny claimants unemployment compensation for work-related misconduct based on their use of the drug. Speaking for the Court, Justice Antonin Scalia summarized the Free Exercise jurisprudence as follows:

> The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, see Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .." U.S. Const., Amdt. 1 (emphasis added.) The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." Sherbert v. Verner, supra, 374 U.S., at 402. The government may not compel affirmation of religious belief,. . . punish the expression of religious doctrines it

> believes to be false,... impose special disabilities on the basis of religious views or religious status,. . . or lend its power to one or the other side in controversies over religious authority or dogma ....

Id. at 876-77 (parallel and certain other citations omitted).

However, Justice Scalia noted that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." Id. at 878-79. The right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." Id., at 898, relying, inter alia, on United States v. Lee, 455 U.S. 252, 263, n. 3 (1982) (Stevens, J., concurring in judgment) (religious belief of Amish taxpayer in conflict with payment of taxes affords no basis for resisting tax imposed on employers to support social security system, which must be applied uniformly to all except as Congress provides explicitly otherwise).

Accordingly, the United States Supreme Court held that, although a state would violate the Free Exercise Clause if it sought to ban the performance of (or abstention from) physical acts solely because of their religious motivation, Smith, 494 U.S. at 877-78, the Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that

his religious belief requires (or forbids) if the law is not specifically directed to religious practice, and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons. Id. at 879-882.

The Court acknowledged two exceptions to the general rule that religiously neutral laws of general applicability do not violate the Free Exercise Clause. First, as noted above, the Court recognized that a law which was neutral and general in its terms and applicability, but was nevertheless deliberately enacted to impact some religious practice, would still be subjected to strict scrutiny. Id. at 877-78. Second, the Court mentioned, in dictum, that the "only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action," were ones which "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press ...." Id. at 881. This exception has come to be known as the "hybrid rights" exception, of which the Court listed the following examples:

> Cantwell v. Connecticut, 310 U.S., at 304-307 . . . (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as

> applied to the dissemination of religious ideas); Follett v. McCormick, 321 U.S. 573 (1944) (same), or the right of parents, acknowledged in Pierce v. Society of Sisters, 268 U.S. 510 (1925), to direct the education of their children, see Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school) ....

Id. at 881 (parallel citations omitted).

Finally, the Smith decision did not dilute the authority of the state to enact laws that protect its citizens' right to freely practice their religious beliefs. The Court stated:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an

> exception to their drug laws for sacramental peyote use.

Id. at 890.

Following the Smith case, Congress and many state legislative assemblies accepted the Court's "invitation" to "enact laws that affirmatively foster" the free exercise of religion, as summarized recently by the United States Supreme Court in Cutter v. Wilkinson, 125 S.Ct. 2113 (May 31, 2005). Noting "there is room for play in the joints" between the Free Exercise and Establishment Clauses, 125 S.Ct. at 2121, citing Smith, 494 U.S. at 669, and that there is space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause, the Supreme Court held that the section of the Federal Religious Land Use and Institutionalized Persons Act ("RLUIPA") increasing the level of protection of prisoners' and other incarcerated persons' religious rights did not violate the Establishment Clause of the First Amendment. The Court summarized the post-Smith legislative reaction as follows:

> RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents.
>
> Responding to Smith, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA),. . .

[which] "prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" City of Boerne v. Flores, 521 U.S. 507, 515-516 (1997) (brackets in original) (quoting § 2000bb-1). "[U]niversal" in its coverage, RFRA "applie[d] to all Federal and State law," id., at 516, 117 S.Ct. 2157 (quoting former § 2000bb-3(a)), but notably lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds. In City of Boerne, this Court invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment. Id., at 532-536. FN2

FN2. RFRA, Courts of Appeals have held, remains operative as to the Federal Government and federal territories and possessions. . . . This Court, however, has not had occasion to rule on the matter.

Congress again responded, this time by enacting RLUIPA. Less sweeping than RFRA, and invoking federal authority under the Spending and Commerce Clauses, RLUIPA targets two areas: Section 2 of the Act concerns land-use regulation, 42 U.S.C. § 2000cc; § 3 relates to religious exercise by institutionalized persons, § 2000cc-1. Section 3, at issue here, provides that "[n]o [state or local] government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government shows that the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." § 2000cc-1(a)(1)-(2). The Act defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc-5(7)(A). Section 3 applies when "the substantial burden [on religious exercise] is imposed in a program or activity that receives Federal financial assistance," or "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." § 2000cc-1(b)(1)-(2). "A person may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain

> appropriate relief against a government." § 2000cc-2(a).

125 S.Ct. at 2118-2119 (parallel and other citations and certain footnotes omitted).

Numerous states passed their own religious freedom restoration or protection legislation in response to the Smith and City of Boerne cases, to restore the traditional (compelling interest, strict scrutiny) test. See generally Porto, Brian L., J.D., Validity, Construction and Operation of State Religious Freedom Restoration Acts, 116 A.L.R. 5th 233 (2005); Menninger, Karl A., J.D., Interference With the Right to Free Exercise of Religion, 63 Am. Jur. Proof of Facts 3d 195 (2005). Pennsylvania is one such state, as remarks by the RFPA's co-sponsor, President pro tempore Senator Robert C. Jubelirer and many other Senators demonstrate. 186th Gen. Assem., Pa. Senate Journal, 2002 Reg. Sess. No. 67, Bill on Third Consideration and Final Passage (November 20, 2002).

III. The Litigation

Inasmuch as the motion for summary judgment before the Court is on the "threshold issues" before completion of discovery, and the case-specific motions for summary judgment (if any) are due in February, 2006, the facts upon which the Court will base its rulings on the threshold issues are gathered primarily from the parties' initial pleadings [i.e., complaints and answers], as supplemented by the statements and counter statements of material facts. Except as otherwise

indicated, the following statement of the facts and procedural history is from the initial pleadings.

A. Combs v. Homer-Center School District, Civil Action No. 04-1599

Plaintiffs Darrell and Kathleen Combs filed suit against Homer-Center School District and Joseph F. Marcoline, in his official capacity as Superintendent of the School District, in the Court of Common Pleas of Indiana County, Pennsylvania, on September 23, 2004, seeking both declaratory and injunctive relief pursuant to the RFPA, the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983. (Complaint, Intro.). Defendants removed the case to United States District Court for the Western District of Pennsylvania, pursuant to 28 U.S.C. §1441, on October 19, 2004. The pertinent factual averments from the complaint are as follows.

The Combs are the parents of children who are of compulsory school age within the statutory language of the Pennsylvania School Code, 24 P.S. §1326, and reside within the boundaries of the Homer-Center School District. (Complaint, ¶¶1, 2). Pursuant to Act 169, Plaintiffs elected to home school their children based on sincerely held religious beliefs for the past eight years. (Complaint, ¶5). Defendants are charged with administering the Home Education Program and the enforcement of Pennsylvania's compulsory school attendance laws. (Complaint, ¶4). In accordance with Act 169, Plaintiffs submitted an affidavit stating their proposed educational objectives for the 2003-2004

school year on or about June 5, 2003. (Complaint, ¶6). In a letter dated July 28, 2003, Plaintiffs notified Defendants that Act 169 imposed substantial burdens on the free exercise of their religion. (Complaint, ¶¶7, 10). Furthermore, in reliance upon the RFPA, Plaintiffs sought "the protection of the [RFPA]" (Complaint, ¶8).

Plaintiffs concede that their "religious beliefs acknowledge that the civil government may require them to educate their children, but according to their religious belief, the civil government lacks jurisdiction to approve or administratively supervise the education they provide." (Complaint, ¶12). Plaintiffs express the sincerely held religious belief that "God has given parents jurisdiction and authority over the education of their children," that it would be "sinful for them to engage in conduct or expression that would grant control over their children's education to the civil government... [or require them to] seek approval from the secular civil government for the holy and sacred education that they are duty bound by God to provide their children," and that "parents are charged by God to raise their children in the nurture and admonition of the Lord." (Complaint, ¶¶13-16).

More specifically, Plaintiffs complain that: (1) Act 169 cedes too much control over their children's religious education to Defendants, and requires them to become "excessively associated" with the School District, in requiring them to submit an affidavit outlining their educational objectives to Defendants at the beginning of each school year; (2) their free exercise of religion is substantially

burdened because Act 169 requires that they submit an educational log and a portfolio containing samples of their children's work to Defendants for discretionary administrative review; and (3) Act 169 confers the district superintendent with unbridled "authority, jurisdiction, and subjective discretion to approve the appropriateness of the religious education they provide their children based upon his review of the educational log and portfolio." (Complaint, ¶¶22, 23, 24).

Defendant Marcoline warned Plaintiffs that if they chose to pursue an exemption from Act 169 based on their religious beliefs, he would be compelled to enforce Pennsylvania's compulsory school attendance laws, and subsequently, Marcoline requested Plaintiffs submit their formal evaluation, educational log, and portfolio containing samples of their children's educational work for administrative review. (Complaint, ¶28-29). Plaintiffs responded that they did not intend to submit the requested materials because they were claiming a religious exemption under the Pennsylvania Religious Freedom Protection Act. (Complaint, ¶30). Based upon Plaintiffs' failure to comply, Defendant Marcoline initiated a prosecution against Plaintiffs for truancy. (Complaint, ¶¶40, 41, 42).

Plaintiffs also aver that Superintendent Marcoline did not notify them of his initial determination that "appropriate education" was not taking place, and did not initiate the "appeal" and hearing procedures required by the home schooling act for making a final determination about the "appropriate education." (Complaint, ¶¶31-36).

Plaintiffs' complaint sets forth seven counts. Count I claims that Act 169 violates the RFPA. (Complaint, ¶¶22, 23, 49, 52). Count II asserts violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution because Act 169's educational log and portfolio requirements "vest Defendants with unbridled discretionary review" of Plaintiffs' religious home education to determine whether appropriate education is occurring. (Complaint, ¶59). Count III alleges that Act 169 violates the Due Process Clause because the statute fails to provide a "neutral magistrate," one who has no vested financial stake in the outcome of the decision. (Complaint, ¶¶61, 62). The amount of state funding a district receives is determined, in part, by how many students attend the district; therefore, Plaintiffs allege, the district superintendent has an impermissible financial stake in determining whether appropriate home education is occurring. (Complaint, ¶¶64, 65).

Count IV alleges a Due Process violation because Act 169 invades Plaintiffs' right to privacy in requiring parents to maintain and submit to the district superintendent a detailed log of the titles of books read by their children and samples of their children's educational work. (Complaint, ¶¶68, 69). Count V asserts a "prior restraints," First Amendment Free Speech violation, arguing that the "government cannot demand the right to review prior speech as a condition to exercising the right to engage in future speech." (Complaint, ¶71). Before parents can commence a home education program, Act 169 requires that they submit an affidavit prior

to the start of each school year outlining their educational objectives. (Complaint, ¶73). After the first year of home schooling, Act 169 requires parents to obtain the discretionary approval of the district superintendent "in order to engage in further, future acts of protected speech for the following year." (Complaint, ¶¶72, 74).

Count VI alleges that Act 169 violates the First Amendment Establishment Clause by creating excessive entanglement with citizens' free exercise of religion. (Complaint, ¶77). Specifically, Plaintiffs assert that the Establishment Clause prohibits state agencies from conducting discretionary reviews of the content of religious education, or from having the power to "authorize or approve religious education." (Complaint, ¶78). Plaintiffs argue that Act 169's requirement that they submit an educational log and a portfolio to the Superintendent at the end of each school year for his discretionary review is itself a form of excessive entanglement because Defendants have the authority to determine whether appropriate religious home education is occurring. (Complaint, ¶79).

Finally, Count VII asserts that Act 169 violates the Free Exercise Clause. "Generally applicable, neutral statutes that impose substantial burdens on religiously motivated conduct that is reinforced with the rights of parents to direct their children's religious home education violates the Free Exercise Clause unless supported by a compelling state interest and the least restrictive means is employed to realize that state interest." (Complaint, ¶81). Plaintiffs assert that Act 169 imposes

substantial burdens on their free exercise of religion because the statute compels them to engage in conduct and expression that violate specific tenets of their religious faith. (Complaint, H 82). Also, Plaintiffs allege that there is no compelling state interest in burdening Plaintiffs' free exercise of religion, and if there is, the least restrictive means were not employed to realize that interest. (Complaint, ¶ 81).

Plaintiffs seek a preliminary and permanent injunction, enjoining defendants from prosecuting Plaintiffs under the compulsory education laws for truancy because of their refusal to submit the logs and portfolios required by Act 169. Plaintiffs also request this Court to render the following declaratory relief: (i) to declare that Act 169 compels conduct and expression that violates specific tenants of plaintiffs' religious faith, and therefore violates the RFPA; (ii) to declare Act 169's log and portfolio requirements "void for vagueness" under the Due Process Clause, on its face and as applied to plaintiffs' "religious education program"; (iii) to declare Act 169's "requirement for a superintendent's review of the contemporaneous log and portfolio" unconstitutional on its face and as applied, because the superintendent is not a "neutral magistrate"; (iv) to declare Act 169's "requirement for a superintendent's review of the contemporaneous log and portfolio" unconstitutional on its face and as applied, because it violates plaintiffs' Due Process right to privacy; (v) to declare Act 169's requirement that parents submit an outline of proposed course objectives by subject area unconstitutional on its face and as applied because it

amounts to "prior restraint" of speech, prohibited by the Free Speech Clause of the First Amendment; (vi) to declare Act 169's "requirement for a superintendent's review of the contemporaneous log and portfolio" unconstitutional as applied, because it results in "excessive entanglement with religion" in violation of the Establishment Clause of the First Amendment; and (vii) to declare Act 169's "requirement for a superintendent's review of the contemporaneous log and portfolio" unconstitutional on its face and as applied under the Free Exercise Clause of the First amendment.

Defendants have not averred any significant factual denials in their answer; rather, Defendants aver the following affirmative defenses: (1) Plaintiffs' complaint fails to state a claim for which relief can be granted; (2) Act 169 does not substantially burden Plaintiffs' free exercise of their religion since the Act is a generally applicable, neutral statute that is not hostile towards religion; (3) the RFPA is itself unconstitutional[14] because it unlawfully creates substantive rights and violates traditional separation of powers between the legislature and the judiciary; (4) Plaintiffs' claims are barred by any applicable statute of limitations and/or laches; (5) Plaintiffs' claims are barred by the doctrine of privilege; (6) Plaintiffs' claims are barred by the

[14] It is unusual, if not improper, for a state agency charged with enforcing the laws of Pennsylvania to challenge the legislation as unconstitutional, especially in the absence of participation by the Attorney General for the Commonwealth of Pennsylvania. However, Defendants explain in their brief in opposition to summary judgment that they do not intend to press this challenge at this point, but intend to reserve this contention for a later date.

doctrine of justification; (7) Plaintiffs consented to the requirements of the home education program of Act 169 by electing to home school their children; (8) Defendants are entitled to any immunity as provided by state and/or federal law; (9) Act 169 neither burdens Plaintiffs' free exercise of their faith nor causes excessive entanglement; (10) Plaintiffs' right to privacy has not been violated because the government has a legitimate and compelling interest in ensuring the education of children, and Act 169 is not unwarranted government intrusion into the rearing and education of Plaintiffs' child; (11) Act 169 does not impose any restraint on Plaintiffs' exercise of free speech; and (12) Plaintiffs' free exercise of religion has not been violated since the government has a legitimate and compelling interest in ensuring the education of children, and Act 169 is not unwarranted government intrusion into the education of Plaintiffs' children. (Answer, ¶¶13, 14).

B. Previsch v. Norwin School District- Civil Action No. 04-1670

Plaintiffs Thomas and Timari Previsch filed suit against Norwin School District and Richard Watson, in his official capacity as Superintendent, in the Court of Common Pleas of Westmoreland County, Pennsylvania on September 27, 2004, seeking both declaratory and injunctive relief pursuant to the RFPA, the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983. (Complaint, Intro.). This Court obtained jurisdiction pursuant to Defendants' motion for removal pursuant to 28 U.S.C. §1441. The factual averments and legal claims set forth in the Previsch

complaint are quite similar to those in the Combs' complaint.

The Previshes are the parents of children who are of compulsory school age and reside within the boundaries of the Norwin School District. (Complaint, ¶¶1, 2). Pursuant to Act 169, Plaintiffs elected to home school their son, Thomas Prevish, based on sincerely held religious beliefs for the past seven years. (Complaint, ¶9). Defendants are charged with administering the home education program and the enforcement of Pennsylvania's compulsory school attendance laws. (Complaint, ¶4). In accordance with the RFPA, Plaintiffs notified Defendants on August 1, 2004, that Act 169 substantially burdens their free exercise of religion and sought an exemption. (Complaint, ¶¶13, 14, 16). Plaintiffs believe: (1) Defendants "lack jurisdiction to approve or administratively supervise the education" they provide Thomas Prevish, (Complaint, ¶18), and that it would be sinful to: (1) "engage in conduct and expression that would seek approval from the secular civil government" for the religious home education they are duty-bound by God to provide their children. (Complaint, ¶23). Specifically, Plaintiffs object to filing an affidavit outlining their educational objectives prior to the start of each school year. (Complaint, ¶29). Furthermore, Plaintiffs object to submitting an educational log and a portfolio containing samples of Thomas Prevish's educational work. (Complaint, ¶30). In a letter dated September 7, 2004, Timothy McCabe, agent for Defendants, informed Plaintiffs that Thomas Prevish was absent from school without lawful excuse. (Complaint, ¶32). The letter further stated

that if Thomas is subsequently absent from school, Plaintiffs will be charged with truancy. (Complaint, ¶34). Thus, unless exempted from complying with Act 169, Plaintiffs will be subjected to criminal prosecution for truancy. (Complaint, ¶33).

The seven claims averred are virtually identical to those set forth in the complaint in *Combs*. (Complaint ,¶¶ 38-75). Defendants aver only one significant denial: Defendants deny that Act 169 is vague; rather, Defendants aver that the hearing officer created by Act 169 is a neutral and detached adjudicator with little or no financial interest, because the number of students attending Norwin School District is only one factor in determining how much state funding Norwin receives. (Answer, ¶57). Furthermore, Defendants aver affirmative defenses identical to those in *Combs* (Answer, ¶¶1-14), and raise the following additional affirmative defenses: (1) Plaintiffs have failed to mitigate any alleged harm (Answer, ¶7); (2) it is not a "sincerely held religious belief" that to cede authority and/or discretion to Defendants in order to educate Thomas Previsn is a sin, because it is not a tenet of the "Church's Magisterium," sacred Scripture, nor sacred tradition as alleged by Plaintiffs (Answer, ¶10); (3) Plaintiffs waived their right to challenge Act 169 by settling with Defendant in agreeing to comply with the terms of the home education program of Act 169 on November 6, 2003. (Answer, ¶4).

C. Hankin v. Bristol Township School District - Civil Action No. 04-1936

Plaintiffs Thomas and Babette Hankin filed suit against Bristol Township School District and Regina Cesario, in her official capacity as Superintendent, in the United States District Court for the Western District of Pennsylvania on December 22, 2004, seeking both declaratory and injunctive relief pursuant to the RFPA, the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983. (Complaint, Intro.).[15] This Court obtained jurisdiction pursuant to 28 U.S.C. §1343(3)(4) and §1331. (Complaint, ¶2). The RFPA state law claim is predicated on this court's supplemental jurisdiction. 28 U.S.C. § 1367. The pertinent factual averments of the pleadings are as follows.

The Hankins are the parents of children who are of compulsory school age and reside within the boundaries of Bristol Township School District. (Complaint, ¶ 4, 5). Pursuant to Act 169, Plaintiffs elected to home school their children based on sincerely held religious beliefs for the past eleven years. (Complaint, ¶ 8). Plaintiffs notified Defendants on April 2, 2004, that Act 169 substantially burdens their free exercise of religion.

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[15] Ordinarily, this case would have been filed in the United States District Court for the Eastern District of Pennsylvania, but aware of the several similar cases in the Western District of Pennsylvania, the parties agreed that Plaintiffs would file the case in this district and Defendants would not object to venue, in the interests of conservation of judicial and legal resources.

(Complaint, ¶ 10). Specifically, Plaintiffs object to: (1) filing an affidavit outlining their educational objectives prior to the start of each school year, and (2) submitting an educational log and a portfolio containing samples of their children's educational work. (Complaint, ¶¶ 25, 26). Hence, Plaintiffs claimed an exemption under the RFPA in their letter dated March 6, 2004. (Complaint, ¶ 11). Defendants' agents informed Plaintiffs that their children were illegally absent from school, and warned that if the children were not enrolled in public school, private school, or a registered home schooling program within three days, Defendants would charge Plaintiffs with truancy. (Complaint, ¶¶ 28, 29). Thus, unless exempted from Act 169, Plaintiffs will be subject to criminal proceedings for truancy. (Complaint, ¶ 30).

The claims averred are identical to those in *Combs and Prevish.* (Complaint, ¶¶ 38-75). Similarly, Defendants aver affirmative defenses identical to those in *Combs,* although Defendants aver one additional affirmative defense. (Answer, ¶¶ 69-81). Defendants assert that Plaintiffs' claims are barred because they failed to exhaust administrative remedies. (Answer, ¶ 80). Pursuant to local agency law, prior to bringing a matter before a court vested with jurisdiction there must be a final adjudication by the local agency. In this instance, Plaintiffs failed to request a hearing before the Board of School Director for Bristol Township School District regarding the allegations in their complaint.

D. Newborn v. Franklin Regional School District - Civil Action No. 04-1932

Plaintiffs Mark and Maryalice Newborn filed suit against Franklin Regional School District and Stephen Vak, in his official capacity as Superintendent, in the United States District Court for the Western District of Pennsylvania on December 21, 2004, seeking both declaratory and injunctive relief pursuant to the RFPA, the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983. (Complaint, Intro.). This Court obtained jurisdiction pursuant to 28 U.S.C. §1343(3)(4) and 28 U.S.C. §1331. (Complaint, ¶2). The pertinent factual averments of the pleadings are as follows.

The Newborns are the parents of children who are of compulsory school age and reside within the boundaries of Franklin Regional School District. (Complaint, ¶¶5, 6). Pursuant to Act 169, Plaintiffs elected to home school their children based on sincerely held religious beliefs for the past twelve years. (Complaint, ¶9). In accordance with the RFPA, Plaintiffs notified Defendants on August 1, 2003, that Act 169 substantially burdens their free exercise of religion and sought an exemption. (Complaint, ¶¶10, 11, 13). Plaintiffs believe that: (1) Defendants "lack jurisdiction to approve or administratively supervise the education" they provide their children, and (2) that it would be sinful to "engage in conduct and expression that would seek approval from the secular civil government" for the religious home education they are duty-bound by

God to provide their children. (Complaint, ¶¶15, 18). Specifically, Plaintiffs object to filing an affidavit outlining their educational objectives prior to the start of each school year. (Complaint, ¶26). Furthermore, Plaintiffs object to submitting an educational log and a portfolio containing samples of their children's educational work. (Complaint, ¶ 27). In a letter dated November 21, 2003, Defendants informed Plaintiffs that they did not believe that the home education program imposed substantial burdens on the free exercise of Plaintiffs' religion. (Complaint, ¶ 29). Additionally, the letter stated that Defendants were considering initiating truancy proceedings because Plaintiffs failed to provide an affidavit outlining their educational objectives for the 2003-2004 school year. (Complaint, ¶31). Thus, unless exempted from complying with Act 169, Plaintiffs will be subjected to criminal prosecution for truancy. (Complaint, ¶ 33).

The claims averred are identical to those in the other complaints. (Complaint, ¶¶ 35-69). Similarly, Defendants aver affirmative defenses identical to those in *Combs*, and deny that their letter dated November 21, 2003, intimated that they were considering initiating truancy proceedings. (Answer, ¶¶ 31, 71-89).

E. Nelson v. Titusville Area School District - Civil Action No. 05-070E

Plaintiffs Douglas and Shari Nelson filed suit against Titusville Area School District and John D. Reagle, in his official capacity as acting Superintendent, in United States District Court for

the Western District of Pennsylvania on February 28, 2005, seeking both declaratory and injunctive relief pursuant to the RFPA, the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983. (Complaint, Intro.). This Court obtained jurisdiction pursuant to 28 U.S.C. §1343(3)(4) and 28 U.S.C. §1331. (Complaint, ¶2). The pertinent factual averments of the pleadings are as follows.

The Nelsons are parents of children who are of compulsory school age and reside within the boundaries of Titusville Area School District. (Complaint, ¶¶4, 5). Pursuant to Act 169, Plaintiffs elected to home school their children based on sincerely held religious beliefs for the past eight years. (Complaint, ¶8). In accordance with the RFPA, Plaintiffs notified Defendants that Act 169 substantially burdens their free exercise of religion and sought an exemption from Act 169. (Complaint, ¶¶9, 10). Plaintiffs believe: (1) Defendants "lack jurisdiction to approve or administratively supervise the education" they provide their children, and that (2) it would be sinful to "engage in conduct and expression that would seek approval from the secular civil government" for the religious home education they are duty-bound by God to provide their children. (Complaint, ¶¶14, 18). Specifically, Plaintiffs object to filing an affidavit outlining their educational objectives prior to the start of each school year. (Complaint, ¶24). Furthermore, Plaintiffs object to submitting an educational log and a portfolio containing samples of their children's educational work. (Complaint, ¶25).

In letters dated August 11, 2004, and September 24, 2004, Defendants requested Plaintiffs submit their educational log and portfolio. (Complaint, ¶27). Subsequently, in a letter dated January 10, 2005, Defendants informed Plaintiffs that if they "did not submit portfolios for the 2003-2004 school year, and an affidavit of intent to home educate for the 2004-2005 school year," then Defendants would initiate truancy proceedings. (Complaint, ¶28). Thus, unless exempted from Act 169, Plaintiffs will be subjected to criminal prosecution for truancy. (Complaint, ¶30).

The claims averred are identical to those in *Combs* as are the affirmative defenses. (Complaint, ¶¶37-71; Answer ¶¶64-82).

F. Weber v. Dubois Area School District - Civil Action No. 05-203J

Plaintiffs Steven and Meg Weber filed suit against Dubois Area School District and Sharon Kirk, in her official capacity as Superintendent, in the United States District Court for the Western District of Pennsylvania on March 23, 2005, seeking both declaratory and injunctive relief pursuant to the RFPA, the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §1983. (Complaint, Intro.). This Court obtained jurisdiction pursuant to 28 U.S.C. §1343(3)(4) and 28 U.S.C. §1331. (Complaint, ¶2). The pertinent factual averments of the pleadings are as follows.

The Nelsons are parents of children who are of compulsory school age and reside within the

boundaries of Dubois Area School District. (Complaint, ¶¶4, 5). Pursuant to Act 169, Plaintiffs elected to home school their children based on sincerely held religious beliefs for the past eight years. (Complaint, ¶8). Defendants are charged with administering the Home Education Program and the enforcement of Pennsylvania's compulsory school attendance laws. (Complaint, *¶7).* In accordance with the RFPA, Plaintiffs notified Defendants on July 10, 2004, that Act 169 substantially burdens their free exercise of religion and sought an exemption. (Complaint, ¶¶10, 12). Plaintiffs believe: (1) Defendants "lack jurisdiction to approve or administratively supervise the education," they provide their children, and (2) that it would be sinful to "engage in conduct and expression that would seek approval from the secular civil government" for the religious home education they are duty-bound by God to provide their children. (Complaint, ¶¶13, 17). Specifically, Plaintiffs object to filing an affidavit outlining their educational objectives prior to the start of each school year. (Complaint, ¶24). Furthermore, Plaintiffs object to submitting an educational log and a portfolio containing samples of their children's educational work to Defendants for discretionary review. (Complaint, ¶25).

In a letter dated December 3, 2004, Defendants' agent informed Plaintiffs that they did not believe the Home Education Program imposed substantial burdens on the free exercise of Plaintiffs' religion. (Complaint, ¶27). Subsequently, on January 11, 2004, Defendants informed Plaintiffs that they would initiate truancy proceedings unless Plaintiffs' children attended public school. (Complaint, ¶28). In

response, Dewitt T. Black III, attorney for Home School Legal Defense Association, wrote to Defendants on behalf of the Plaintiffs on January 13, 2005, and on February 23, 2005, requesting that they wait to file truancy charges until five federal cases on the applicability of the RFPA to Act 169 were resolved." (Complaint, ¶29). Defendants replied on February 28, 2005, stating that they decided not to wait until the five outstanding federal cases were resolved prior to filing truancy charges. (Complaint, ¶30). Thus, unless exempted from complying with Act 169, Plaintiffs will be subjected to criminal prosecution for truancy. (Complaint, ¶31).

The claims averred are identical to those in *Combs* as are the affirmative defenses. (Complaint, ¶¶35-69, Answer, ¶¶1-14). In terms of denials, Defendants deny that Sharon Kirk, in her official capacity as Superintendent of Dubois Area School District, is subject to liability for the aforementioned claims. (Answer, *¶6).* Also, Defendants averred that the parties have entered stipulation regarding the prosecution of truancy charged against Plaintiffs. (Answer, ¶30).

IV. Summary Judgment Framework and Standards

A. Motion for Summary Judgment, Response, and Briefs

On December 16, 2004, this Court conducted a case management conference of all parties in the six consolidated cases. Because Plaintiffs are challenging Act 169 both on its face and as applied,

the Court decided that two rounds of summary judgment motions would be appropriate, with the first round to address all the "threshold issues" discussed at the conference, i.e., the "on its face" constitutional challenges. By Order of March 15, 2005, the Court consolidated all of the cases at Civil Action No. 04-1599, and directed a "consolidated summary judgment motion addressed to the threshold legal issues discussed at the conference" to be filed.

The initial motion for summary judgment was not expected to raise any "fact-driven" issues, since discovery was on-going and briefing on such issues would be premature. Defendants were directed to file one consolidated response and brief in opposition, and Plaintiffs were permitted to file a reply brief. Subsequently, the Court granted the motion of the Commonwealth of Pennsylvania Department of Education to file an *amicus* brief in opposition to the motion for summary judgment, which "emphasize[d] the Commonwealth's compelling interest in ensuring high-quality home education without imposing an undue burden on the religious interests of parents." Amicus Brief at 1. Later, the Court directed the PDE to file a supplemental brief addressing the interplay between the School Code and the RFPA. An additional status conference was conducted on April 11, 2005, for the purpose of clarifying the scope of the threshold summary judgment motion.

On May 31, 2005, Plaintiffs filed their consolidated motion for summary judgment, brief in support, concise statement of material facts, and 30 volumes of appendices. (Documents No. 29-61,

respectively). The appendices consisted of the portfolios, logs, declarations and other documentation put together by the Plaintiffs in the six consolidated cases, and those put together by 24 other non-party parents and supervisors of home education programs in various party and non-party school districts. Because the 30 volumes of materials were not relevant to the threshold issues, the Court granted Defendants' joint motion to strike the appendices in part, stating that "plaintiffs ... filed boxes of appendices (doc. nos. 32 through 61) consisting of 30 notebooks of factual information and declarations. The Court will not consider said material at this time but instead will stay focused on the threshold legal issues." Order of June 16, 2005 (Document No. 67).

In their concise statement of material facts ("CSM"), Plaintiffs make the following assertions. All of the Plaintiffs' home schooled children have been home schooled "between five and thirteen years." CSM ¶ 2. All of the Plaintiff-Parents believe that children are a gift from God, that "education is religion," that "God commands them to educate their children at home," that plaintiffs "believe that the requirements of Act 169 puts the State as the final authority over the education of their children, which is a violation of their religious belief," and that Act 169 "requires conduct or expression that violates their religious beliefs" making it impossible to comply with Act 169 "in good conscience." CSM, ¶¶ 6-11.

Plaintiffs assert that many of their portfolios include "religious work samples." CSM, ¶15. The

concise statement of material facts then sets forth the following: descriptions of the portfolio/ documentation/ declaration appendices submitted by Plaintiffs and 24 non-parties, ¶¶16-42; descriptions of the "Effects of Portfolios," including that portfolios take time to assemble, provide no educational benefit, induce stress ("pre-portfolio syndrome"), that some of the portfolios were returned apparently without having been reviewed, and that "some home schooling parents feel it is an invasion of their privacy to meet with a school district supervisor to review their portfolios." CSM ¶¶ 43-52. The concise statement also complains that the various party and non-party school districts utilized a variety of approaches in reviewing the portfolios and logs, and applied varying degrees of intensity of review. CSM ¶¶ 53-79.

Finally, Plaintiffs make the following conclusory statements: the "detailed requirements of Act 169 as interpreted by the PDE are not in furtherance of a compelling state interest"; the "detailed requirements of Act 169 as interpreted by the PDE are not the least restrictive means" of furthering a compelling state interest; 27 states do not require year-end assessments; 21 states require either standardized tests or evaluation, but not both; only eight other states require portfolios; no other state requires a detailed log. CSM ¶¶ 80-85.

B. The Specific "Substantial Burden" Alleged by Plaintiffs

Plaintiffs acknowledge that RFPA obligates them to first show that Act 169 imposes a

"substantial burden" on the exercise of their religion, by clear and convincing evidence, in order to shift the burden of proof to the school districts and superintendents to justify that burden by demonstrating the state's compelling interest and that there are no less restrictive means of furthering that interest. Brief in Support of Summary Judgment at 5. The specific statutory burden Plaintiffs assert is the fourth identified by the RFPA, namely, where the agency action "[c]ompels conduct or expression which violates a specific tenet of a person's religious faith." 71 Pa. Stat. Ann. §2402(4). Brief in Support of Summary Judgment at 5.

Despite having home schooled their children from at least five to thirteen years, however, Plaintiffs do not specify any actual, tangible ways in which Act 169 impairs or restricts the exercise, practice, conduct or expression of their religion during those five to thirteen years or currently. The "Effects of Portfolios" that Plaintiffs identify as flowing from Act 169's portfolio and log requirements (i.e., these requirements are time consuming and stressful, and not beneficial to their children's education) are the same effects encountered by all parents and supervisors of home schooled children, not just those who home school for religious reasons. In other words, these "Effects" do not describe any particular impact on the exercise, practice, conduct or expression of religion, but rather describe the common, general consequences caused by Act 169's requirements that home schoolers compile, organize and present portfolios and logs for review by school districts and their superintendents.

Although Plaintiffs state that their "focus" in this litigation is on Act 169's portfolio requirements, the only negative effect alleged that is not common to all home schoolers, and the only religious impact that a fair reading of Plaintiffs' concise statement of material facts and brief will sustain, is that Act 169 places "authority" over their children's education, which, to Plaintiffs, "is religion," in secular hands, and that placing of authority in any state agency violates their sincerely held religious beliefs. Brief in Support of Summary Judgment at 5-7. Plaintiffs state that "the Lord has established jurisdictional boundaries between the family and the State," that "subjecting their home education program to the authority, oversight and discretionary review of the State violates Biblically-ordained jurisdictional lines between the family and the State," and that these "twelve plaintiffs, who come from diverse religious backgrounds, have each concluded that compliance with Act 169 amounts to an unbiblical surrendering of their God given authority as parents to the State." Brief in Support of Summary Judgment at 6-7.

C. Summary Judgment Standards

Summary judgment under Fed.R.Civ.P. 56(c) is appropriate "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Woodside v. School Dist. of Philadelphia Bd. of Educ., 248 F.3d 129, 130 (3d Cir. 2001), quoting Foehl v. United States, 238 F.3d 474, 477 (3d Cir. 2001) (citations omitted). In deciding a

summary judgment motion, the court must "view the evidence . . . through the prism of the substantive evidentiary burden" to determine "whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of the evidence required by the governing law or that he did not." Anderson v. Consolidated Rail Corp., 297 F.3d 242, 247 (3d Cir. 2002), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).

When the non-moving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing' — that is, pointing out to the District Court — that there is an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the moving party has carried this burden, the burden shifts to the non-moving party who cannot rest on the allegations of the pleadings and must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1230 (3d Cir. 1993). Thus the non-moving party cannot rest on the pleadings, but instead must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial," Fed.R.Civ.P. 56(e), and cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989) (citing Celotex, 477 U.S. at 325 (1986)). The non-moving party must respond "by pointing to sufficient

cognizable evidence to create material issues of fact concerning every element as to which the non-moving party will bear the burden of proof at trial." Simpson v. Kay Jewelers, Div. Of Sterling, Inc., 142 F. 3d 639, 643 n. 3 (3d Cir. 1998), quoting Fuentes v. Perskie, 32 F.3d 759, 762 n. 1 (3d Cir. 1994).

"In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence 'is to be believed and all justifiable inferences are to be drawn in his favor.' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)." Marino v. Industrial Crating Co., 358 F.3d 241, 247 (3d Cir. 2004.) See also Doe v. County of Centre, PA, 242 F.3d 437, 446 (3d Cir. 2001) (court must view facts in the light most favorable, draw all reasonable inferences, and resolve all doubts, in favor of the nonmoving party).

V. Discussion of Legal Issues

A. Pennsylvania Religious Freedom Protection Act

1. Canons of Construction

As far as the Court and parties are aware, the RFPA of 2002 has not been interpreted by any court in the Commonwealth of Pennsylvania, state or federal, and its applicability and effect in this case is a matter of first impression. In interpreting the RFPA, the Court will consider Pennsylvania's relevant canons of construction, codified at 1 Pa.C.S. §§1900-1978.

All statutory construction of Pennsylvania statutes is guided by the principle that the canons adopted by the legislature shall be observed, unless the application of such canons would result in construction inconsistent with the manifest intent of the General Assembly. 1 Pa. C.S.A. §1901. The "object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S.A. §1921. This is the primary rule of statutory construction and all other rules of statutory construction are secondary thereto. Pennsylvania Human Relations Comm'n v. Alto-Reste Park Cemetery Ass'n, 306 A.2d 881, 885 (Pa. 1973).

Words and phrases used in statutes enacted by the General Assembly are to be construed according to their common usage, whereas technical words and phrases that have acquired a peculiar meaning shall be construed to such peculiar definition. 1 Pa. C.S.A. § 1903.[16] When the words of a statute are free from all ambiguity, those provisions are not to be disregarded under the pretext of pursuing its spirit, 1 Pa. C.S.A. §1921;[17] rather,

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[16] See e.g. Commonwealth v. Hill, 391 A.2d. 1303, 1306 (Pa. 1973) (emphasis added), ("Language of statute must be construed according to common and approved usage, and where possible it should be interpreted in manner so as to give effect to each and every provision of act."); Commonwealth v. Mumma, 414 A.2d 1026, 1029 (Pa. 1980), ("When interpreting a statute, Supreme Court is guided by the plain meaning rule of construction.").

[17] See e.g. Commonwealth v. Pope, 317 A.2d 887, 889 (Pa. 1974), ("A court may not alter, under the guise of 'construction,' the express language and intent of the

"[w]hen the words of a statute are plainly expressive of an intent, the interpretation must be in accordance therewith." Bradbury v. Wagenhorst, 54 Pa. 180 (1867). Conversely, when a statutory term is ambiguous on its face, the intention of the General Assembly may be ascertained by considering:

> (1) the occasion and necessity for the statute, (2) the circumstances under which it was enacted, (3) the mischief to be remedied, (4) the object to be attained, (5) the former law, if any, including other statutes upon the same or similar subjects, (6) the consequences of a particular interpretation, and (7) the contemporaneous legislative history, and (8) legislative and administrative interpretations of such statute.

1Pa. C.S.A. §1921.[18]

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legislature."); Commonwealth ex rel. Cartwright v. Cartwright, 40 A.2d 30, 33 (Pa. 1944) ("When language of statute is plain and unambiguous and conveys clear and definite meaning, there is no occasion for resorting to rules of statutory construction, but statute must be given its plain and obvious meaning, though court may be convinced by extraneous circumstances that legislature intended to enact something very different.").

[18] See e.g. Frontini v. Com. Dept. of Transp., 593 A.2d 410, 412 (Pa. 1991), ("Whenever a court attempts to ascertain the meaning of language within a statute, its goal is to effectuate the intent of the Legislature."); Commonwealth v. Shawell, 191 A. 17, 20 (Pa. 1937), ("In construing an ambiguous statutory term, which is subject to more than one interpretation, court will adopt construction which will

Courts shall construe every statute to give effect to all its provisions. 1 Pa. C.S.A. §1921.[19] Thus, the "language of a statute must be construed, where possible, in a manner so as to give effect to each and every provision of the act." Commonwealth. v. Hill, 391 A.2d. 1303, 1306 (Pa. 1973).

In ascertaining the intention of the General Assembly in enacting a statute, two presumptions may be employed:

> that the General Assembly does not intend to violate the Constitution of the United States or this Commonwealth and (2) that when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statues on the same subject matter intends the same constructions to be placed upon such language.

1 Pa. C.S.A. §1922.[20]

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effectuate intention of Legislature."); In re Umholtz, 43 A.2d 75, 765 (Pa. 1899) ("Statutes are to be so construed as to best effectuate the intention of the legislature, though such construction may seem contrary to the letter.").

[19] See e.g. Commonwealth v. Pope, 317 A.2d 887, 889 (Pa. 1974) ("A statute must be construed, if possible, to give effect to all its provisions, making the entire statute effective and certain.").

[20] See e.g. Evans v. West Norriton Tp. Mun. Auth., 87 A.2d 474, 478 (Pa. 1952) ("An Act of Assembly can be declared void only when it violates constitution clearly, palpably and plainly; and when Act is doubtful, and two constructions are reasonably possible, one of which will render Act

Statutes 'in pari materia' shall be construed together as one statute. 1 Pa. C.S.A. §1932. Statutes are 'in pari materia' when "they relate to the same persons or things or the same class of persons or things." 1 Pa. C.S.A. §1932. Thus, "[s]tatutes pertaining to the same subject matter are to be considered as one if possible," Girard Sch. Dist. v. Pittenger, 392 A.2d 261, 265 (Pa. 1978), and "in harmony with the existing law, and as part of a general and uniform system of jurisprudence," In re Peplinski's Estate, 29 A.2d 271, 275 (Pa. Super. 1944). Examples of statutes that have been construed as in pari materia include: Hamilton v. Unionville-Chadds Ford Sch. Dist., 714 A.2d 1012, 1015 (Pa. 1998) ("[D]istrict code and the middle school code are 'in pari materia'," because "both portion of the school codes in question relate to disciplinary procedures, and thus involves the same subject matter."); Carroll v. Ringgold Edu. Ass'n, 680 A.2d 1137, 1141 (Pa. 1996) ("Public Employee Relations Act is to be read 'in pari materia' with the addition of Article XI-A of the Public School Code, but PERA is repealed insofar as it is clearly inconsistent with the addition of Article XI-A of the Act."); Girard Sch. Dist. v. Pittenger, 392 A.2d 261, 265 (Pa. 1978) ("Sections 510 et al. of the School Code and the statement of the State Board on

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unconstitutional and another unconstitutional, court should adopt construction which renders statute constitutional."); Milk Control Comm'n v. Battista, 198 A.2d 840, 843 (Pa. 1964) ("All doubt is to be resolved in favor of sustaining legislation which is sought to be upset on constitutional grounds."); Pennsylvania Liquor Control Bd. v. Spa Athletic Club, 485 A.2d 732, 735 (Pa. 1984) ("Legislation will not be invalidated unless it clearly, palpably, and plainly violates the Constitution, and any doubts are to be resolved in favor of finding of constitutionality.").

Student Rights and Responsibilities should, in fact, be considered as 'in pari materia."); Barret v. Com., Dept. of Ed., 414 A.2d 763 (Pa. Commw. Ct. 1980) ("Article XI and Article XIX of the Public School Code were enacted contemporaneously, and 24 P.S. §19-1926, makes specific reference to the employment rights set out in Article XI. These provisions are therefore 'in pari materia' and must be construed together if possible."). Statutes 'in pari materia' should be considered concurrently and, whenever possible, effect should be given to both. First Nat'l Bank of Millville v. Horwatt, 162 A.2d 60, 62 (Pa. Super. 1960).

2. Interpretation of the RFPA - Plaintiffs' Threshold Burden of Proof

The RFPA is not ambiguous as to the issues raised in this case. It defines key terms in plain language and it lays out the respective burdens of proof.

As Plaintiffs acknowledge, it is incumbent upon them to first demonstrate, by clear and convincing evidence, that Act 169 imposes a "substantial burden" by compelling conduct or expression that violates a specific tenet of their religious faith. 71 Pa. Stat. Ann. §2402(4). This is the only one of the four "substantial burdens" defined by the RFPA that Plaintiffs are claiming. Before a state agency will be held to its burden of proving a compelling state interest and that there are no less restrictive means to further that interest,

Plaintiffs must pass the "substantial burden" threshold. 71 Pa. Stat. Ann. §§2404, 2405(f).

Assuming all of Plaintiffs' averments are true, and giving them the benefit of all reasonable inferences, they cannot show that Act 169, on its face, burdens their exercise of religion at all, let alone substantially. As noted, all of the Plaintiffs have home schooled their children for five to thirteen years before mounting this statutory and constitutional challenge to Act 169, yet they are unable to identify any specific, concrete, direct (or indirect) effects on the practice or exercise of their religion. There is nothing in the language of Act 169 which restricts the practice of religion, nor in the regulations developed by the PDE, although the statute and the regulations take some care to accommodate religious concerns.

Since Pennsylvania's General Assembly enacted the RFPA to restore the traditional free exercise test — strict scrutiny, compelling interest, less restrictive means — that existed prior to the Smith case, it is appropriate and informative to examine the Free Exercise Clause jurisprudence on the meaning of "substantial burden" and precedent interpreting that phrase in the context of other religious freedom restoration legislation. Construing "substantial burden" as used in the federal Religious Freedom Restoration Act before it was declared unconstitutional as applied to the states, the United States District Court for the District of Maryland stated:

> A "substantial burden" exists in the Constitutional sense when governmental action compels a party to affirm a belief they do not hold, discriminates against an individual or group because of religious belief, inhibits the dissemination of particular religious views, or pressures a party to forego a religious practice. Sherbert v. Verner, 374 U.S. 398, 402-404 (1963) (collecting cases).

Battles v. Anne Arundel County Bd. of Educ., 904 F.Supp. 471, 476-77 (D.Md. 1995).

In Levitan v. Aschroft, 281 F.3d 1313, 1320 (D.C. Cir. 2003), the United States Court of Appeals for the District of Columbia Circuit held that "the First Amendment is implicated when a law or regulation imposes a substantial, as opposed to inconsequential, burden on the litigant's religious practice. Our cases make clear that this threshold showing must be made before the First Amendment is implicated. See Branch Ministries v. Rossotti, 211 F.3d 137, 142 (D.C.Cir. 2000) (holding that, to sustain its claim under either the Constitution or RFRA, a plaintiff must first establish that its free exercise right has been substantially burdened)." The Levitan Court listed several factors to consider in determining whether a plaintiff has met his or her "impingement threshold" as follows:

> The litigant's beliefs must be sincere and the practices at issue must be of a religious nature. See Church of the

Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). The challenged rule must also burden a central tenet or important practice of the litigant's religion.

We are mindful of the Supreme Court's warning that judging the centrality of different religious practices is akin to "the unacceptable 'business of evaluating the relative merits of differing religious claims.'" Smith, 494 U.S. at 887 .... Nonetheless, it is sometimes the case that litigants can make no credible showing that the affected practice is either central or important in their religious scheme. See Henderson, 253 F.3d at 17. In such cases, the *de minimis* burden imposed by the challenged law is not constitutionally cognizable. Id. In other cases, in which the practice at issue is indisputably an important component of the litigants' religious scheme, such evidence may be relevant to overcome any claim that the impact of the challenged law is *de minimis*. Moreover, a rule that bans a practice that is not "central" to an adherent's religious practice might nonetheless impose a substantial burden, if the practice is important and based on a sincere religious belief.

A court may also consider whether the litigants' beliefs find any support in the religion to which they subscribe, or whether the litigants are merely relying on a self-serving view of religious practice. This inquiry is not a matter of deciding whether appellants' beliefs accord in every particular with the religious orthodoxy of their church. See Smith, 494 U.S. at 887, 110 S.Ct. at 1604 (holding that courts should not question the "validity of particular litigants' interpretations" of their creeds).... Nor is it a matter of adjudicating intrafaith differences in practice or belief.... Instead, a court may determine whether the litigants' views have any basis whatsoever in the creed or community on which they purport to rest their claim. For example, a Catholic litigant who asserted that it was part of his religion to wear sunglasses would be making a claim "so bizarre ... as not to be entitled to protection" under the First Amendment. [Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 715 (1981)]. The litigant's assertion of a view so totally foreign to the creed with which he claimed to affiliate might well lead the court to question his sincerity. It is therefore unlikely that a litigant challenging a rule limiting his right to wear

> sunglasses could satisfy the threshold requirement.

Levitan, 281 F.3d at 1320-21 (parallel and certain other citations omitted). See also Branch Ministries, 211 F.3d at 142-44 (collecting tax burden cases where burden on religious institutions from imposition of taxes is deemed incidental, and not substantial, for Free Exercise purposes); Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F.Supp.2d 961, 991 (N.D. Ill. 2003) ("The history of the [federal RLUIPA] statute demonstrates that Congress did not intend to change traditional Supreme Court jurisprudence on the definition of substantial burden. ... 'Substantial burden' has been defined or explained in various ways" and it exists where, for instance, the state puts substantial pressure on an adherent to modify his behavior and to violate his beliefs; the state forces a person to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning the precepts of her religion on the other; or the "government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden," quoting Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 384-85 (1990) (numerous citations omitted)).

Under the Pennsylvania RFPA, a person claiming a "substantial burden" must notify the offending state agency of the "manner in which the exercise of the governmental authority burdens the person's free exercise of religion." 71 Pa. Stat. Ann.

§2405(b)(3). The RFPA defines "substantial burden" as agency action which (1) significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs; (2) significantly curtails a person's ability to express adherence to the person's religious faith; (3) denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion; or (4) compels conduct or expression which violates a specific tenet of a person's religious faith. 71 Pa. Stat. Ann. §2403(4). The burdens contemplated by section 2403 are not abstract or theoretical; they are, instead, restrictions or impairments on a person's ability to exercise, practice, express or act in conformity with their religious beliefs. Similarly, the burdens contemplated by section 2403 concern the negative impact on one's religious exercise, practice, expressions and conduct, not "secular" concerns such as the parents' health and expenditures of time and energy.

Viewing the RFPA as a whole, according to the plain meaning of all of its terms and in accordance with the canons of construction, and considering the foregoing analysis of "substantial burden" in the context of Free Exercise Clause and similar freedom of religion restoration acts, and mindful of the General Assembly's intention to restore the traditional (pre-Smith) free exercise of religion standards, this Court holds that a plaintiff challenging legislation or agency action under the Pennsylvania RFPA must meet the threshold burden of showing, by clear and convincing evidence, that there is or will be denial or substantial infringement

of conduct or expression which violates a specific tenet of his or her religious faith, not simply that the legislation or agency action has some *de minimus*, tangential or incidental impact or is at odds with their religious beliefs.

As will be explained more fully in the Court's discussion of the First Amendment- Free Exercise jurisprudence, Plaintiffs cannot show that Act 169, on its face, places any restriction on or infringement of the practice or exercise of their religion, but (accepting for now the sincerity of their beliefs, which defendants dispute) only that it interferes with their sincerely held religious beliefs that "education is religion" and that the state has no authority to regulate home education programs by such religiously motivated home schoolers. Conceivably, Plaintiffs may be able to demonstrate that, as applied in practice, one or more of the defendant school districts or superintendents applies Act 169 in such a way as to restrict or infringe upon their religious practice or exercise, but Act 169 on its face does not violate the RFPA. Plaintiffs' motion for summary judgment on their facial RFPA challenge to Act 169 must be denied.

B. First Amendment - Free Exercise Clause

1. Overview

As rehearsed, Employment Div., Dep't of Human Resources of Oregon v. Smith signaled a significant change in the First Amendment - Free Exercise Clause analysis of legislation claimed to

infringe on the exercise of religion, in holding that the right of free exercise of religion does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability" on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes). Under current practice, a law ordinarily need not be justified by a compelling interest if it is "neutral" in that it is not targeted at religiously motivated conduct and "generally applicable" in that it does not selectively burden religious conduct. See Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 532-35 (1993).

It is apparent that Act 169 is a neutral law of general applicability to all Pennsylvania home schoolers and their home education programs, with no reference or special impact on religious practices, and Plaintiffs do not claim otherwise. What they claim, however, is that this legislation should be reviewed under the pre-Smith framework because it presents the "hybrid rights" exception recognized in the Smith case, as gleaned from the Meyer, Pierce and Yoder cases, since Act 169 implicates both the free exercise of their religion and another constitutionally protected fundamental right, namely the right of parents to educate their children and participate in their upbringing.

Most of the United States Circuit Courts of Appeals to address this issue have concluded that, even if the Supreme Court would explicitly recognize a "hybrid rights" exception, as their dictum in the Smith case suggests, laws regarding compulsory attendance and home schooling do not fall within

that narrow exception; in other words, the Courts of Appeals have concluded that the parental rights in the education of their children, as important as they are, do not automatically place all parents in the Meyer, Pierce and Yoder class.

2. Parental Rights — Meyer, Pierce and Yoder - Hybrid Rights

The Meyer, Pierce and Yoder trilogy of Supreme Court cases is the genesis of Plaintiffs' argument that government action which both infringes their free exercise of religion or other constitutional rights, and interferes with the rights of parents to choose the manner of education for their children and control their upbringing, must be subject to heightened scrutiny because such action impacts "hybrid rights."

It is well established that the fundamental right of parents to direct the upbringing and education of their children is protected by the Due Process Clause of the Fourteenth Amendment. Troxel v. Granville, 530 U.S. 57, 65 (2000) (recognizing that a parent's due process right in the care, custody, and control of her children is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court," and striking down Washington law giving grandparents rights of access to children in conflict with mother's parental rights); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (finding that ""primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition," and holding that Wisconsin could not compel Amish

children to attend school beyond the age of 14); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (striking down Oregon law that required parents to send their children to a public school, rather than Roman Catholic parochial school, for a period of time because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (recognizing the right of "the parent to give his children education suitable to their station in life," including right to provide education in the family's language, German). However, while the "precise boundaries of a parent's right to control a child's upbringing and education" are not fully delineated, it is "clear ... that the right is neither absolute nor unqualified." C.N. v. Ridgewood Bd. of Educ., ___ F.3d ___, 2005 WL 3211647, *19 (3d Cir. December 1, 2005).

In the Yoder case, the United States Supreme Court stated:

> [T]he First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16. Our disposition of this case, however, in no way alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education. This should

> suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable education requirements. It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life.

406 U.S. at 234-35 (footnote omitted; emphasis added).

The Amish parents in the Yoder case demonstrated a "history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society," the interrelationship of their religious beliefs with their daily life, "the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others." Id. at 235. Moreover, the parents made a "convincing showing, one that probably few other religious groups or sects could make," that the alternatives offered by the state would be completely inadequate to preserve their religious way of life. Id. Still, the Court cautioned that its holding was not intended "to undermine the general applicability of the State's compulsory school-attendance statutes or

to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated." Id.

And in the Pierce case, the United States Supreme Court stated there is no "general power of the state to standardize its children by forcing them to accept instruction from public teachers only," that children are not mere creatures of the state, and that "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 534. Nevertheless, the Court explicitly stated:

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id. at 573.

In Runyon v. McCrary, 427 U.S. 160 (1976), the Supreme Court held that, while it can be

assumed that "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions," it does not follow that such private institutions can deny black children admission solely on the basis of race in defiance of civil rights legislation. The Court easily distinguished the Meyer, Pierce, Yoder line of cases, observing that it "has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation." Runyon, 427 U.S. at 178. And in Bd. of Educ. v. Allen, 392 U.S. 236 (1968), the Court held that neither the Establishment Clause nor the Free Exercise Clause prohibited the state from loaning textbooks to students attending parochial schools, remarking that the Pierce decision did not "question Oregon's power to compel school attendance or require that the attendance be at an institution meeting State-imposed requirements as to quality and nature of curriculum," and that since that decision, "a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to

accept instruction at home as compliance with compulsory education statutes." 392 U.S. at 245-47, citing with approval, People v. Turner, 263 P.2d 685, 687 (Cal. Superior Ct., App. Div. 1953), appeal dismissed for want of substantial federal question, 347 U.S. 972 (1954).

The Turner case upheld a California statute requiring parents to place their children in public schools, a private school meeting certain prescribed conditions, or by private tutor or other person possessing requisite qualifications in the manner prescribed by statute. Home schooling parents who did not meet qualifications challenged the statute as infringing on their parental rights to educate their children, relying on the Meyer, Pierce, Yoder triology.

Rejecting the home schooling parents' argument that the statute deprived them of the right to determine how and where their children may be educated, the Superior Court, Appellate Division held:

> There can be no doubt that if the statute, without qualification or exception required parents to place their children in public schools, it would be unconstitutional . . . . The statute here, however, unlike that involved in the case cited, does not so provide. It recognizes the right of parents not to place their children in public schools if they elect to have them educated in a private school or through the medium of

> a private tutor or other person possessing certain specified qualifications. We see no basis therefore upon which to predicate a holding of unconstitutionality unless such a holding is compelled because the statute denies the right of parents [who do not meet statutory qualifications] to educate their children . . . . Contrary to the contention of the defendant, we see nothing in the Pierce case so declaring or intimating.
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> It is not without significance that, although it has been said that 'only eleven of the forty-eight states permit by statute that instruction may be given at home by their parent or tutor,' and 'such home instruction moreover is specifically conditioned except in two states' (Parental Right in Educational Law, Loughery, Catholic University of America Press, 1952), we have been unable to find a single case in which it has been held that so-called compulsory attendance statutes are rendered unconstitutional and void merely by reason of a failure to recognize home instruction as an alternative to attendance in the public schools.

Turner, 263 P.2d 865-67.

The several United States Circuit Courts of Appeals to have considered the matter all have rejected the argument that a state's restrictions on protected parental rights in the upbringing and education of their children, ala Meyer, Pierce, Yoder, even when combined with a free exercise of religion, due process or some other constitutional challenge, elevates their challenge to a Smith "hybrid rights" claim, or otherwise triggers heightened scrutiny. See, e.g., Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1203-06 (9th Cir. 2005) (parents did not have exclusive right to be sole provider of sex education, nor did parental rights plus due process and privacy claims trigger "hybrid rights" strict scrutiny, and parental rights did not trump state's interests in regulating public school education; numerous cases collected); Crowley v. McKinney, 400 F.3d 965 (7th Cir. 2005) (non-custodial parent's rights to participate in his child's education plus free speech and equal protection claims did not trigger "hybrid rights" strict scrutiny nor trump state's interests in regulating public school education); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001) (uniform policy, even assuming that it regulated expressive conduct entitled to constitutional protection, did not violate students' First Amendment's free speech rights, did not implicate parents' fundamental due process right in the upbringing and education of their children, and was justified by a rational basis; and its opt-out procedure, which required parents with bona fide religious or philosophical objections to apply for exemption by filling out questionnaire designed to gauge the sincerity of their beliefs, did not violate free exercise and establishment clauses of First

Amendment); Hooks v. Clark County Sch. Dist., 228 F.3d 1036 (9th Cir. 2000) (assuming parents have a constitutional right to educate children at home pursuant to Meyer, Pierce, Yoder, they do not have a constitutional right to state-funded speech therapy services provided to private or public schooled children; states have discretion to determine whether home education qualifies as a "private school," and the school district's refusal of IDEA services to home schoolers did not violate due process); Swanson v. Guthrie Indep. Sch. Dist. No. 1-L, 135 F.3d 694 (10th Cir. 1998) (parents had no constitutional right "to send their children to public school on a part-time basis, and to pick and choose which courses their children will take from the public school," upholding school district's full-time attendance policy against Meyer, Pierce, Yoder parental rights and free exercise of religion challenge, and rejecting attempt to claim "hybrid rights" status); Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996) (upholding school district's mandatory community service program against Meyer, Pierce, Yoder parental rights, due process and involuntary servitude challenge); Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003) (parent's challenge to mandatory health education curriculum on religious grounds was subject to rational basis, rather than strict scrutiny, review, and did not command strict scrutiny merely because it invoked "hybrid rights," i.e., Meyer, Pierce, Yoder parental rights claim and other constitutional provisions in addition to free exercise clause); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995) (upholding compulsory high school sex education assembly

program against parents' challenges that sexually explicit AIDS awareness assembly violated privacy rights and right to rear children ala Meyer, Pierce, Yoder, due process, free exercise clause and right to educational environment free from sexual harassment). See also Kissinger v. Bd. of Trustees of the Ohio State Univ., Coll. of Veterinary Med., 5 F.3d 177 (6th Cir. 1993) (where free exercise of religion combined with various other First Amendment claims, the Court of Appeals for the Sixth Circuit explicitly rejected the more stringent "hybrid rights" legal standard suggested by the dictum in Smith, explaining that it did not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights).

The United States Court of Appeals for the Third Circuit has not explicitly decided that it would apply heightened scrutiny to "hybrid rights" challenges, but has suggested, in dictum, that a form of strict scrutiny analysis might be appropriate in a "hybrid rights" situation. Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002). The Court of Appeals applied the Smith test, stating that if "a law is 'neutral' and 'generally applicable,' and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection." Id. at 165. In a footnote, the Court observed that strict scrutiny "may also apply when a neutral, generally applicable law incidentally burdens rights protected by 'the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the rights of parents ... to direct

the education of their children,' Smith, 494 U.S. at 881, 110 S.Ct. 1595 (citations omitted), but the plaintiffs do not assert such a 'hybrid rights' claim." 309 F.3d at 165 n. 26. At least one district court within the Third Circuit has, not unreasonably, read this dictum in Tenafly as indicating the Court of Appeals for the Third Circuit will recognize and apply the "hybrid rights" heightened scrutiny analysis. Green v. Philadelphia, 2004 WL 1170531, *7 (E.D.Pa. 2004).

On December 1, 2005, the Court of Appeals for the Third Circuit upheld the authority of the state and/or its school boards to request,[21] in the immediate aftermath of the Columbine massacre, that students fill out detailed but anonymous surveys regarding the public school students' views on a host of personal matters, including sex, drug use and suicidal or antisocial behavior, against a challenge by parents that such survey violated parents' and students' Due Process right to privacy and First Amendment right against compelled expression, and parents' Due Process right to participate and control the upbringing and education of their children. C.N. v. Ridgewood Bd. of Educ., ___F.3d___, 2005 WL 3211647, *19 (3d Cir. December 1, 2005) ("Courts have held that in certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment. "), citing with approval Swanson v.

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[21] Ostensibly, completion of the survey was to be voluntary, but the Court of Appeals agreed with the parents claim that, in practice, there was at least some coercion to fill out the forms, but that did not alter the Court's determination.

Guthrie Indep. Sch. Dist. and Brown v. Hot, Sexy and Safer Prods., Inc., inter alia. See also Parents United for Better Schools, Inc. v. Sch. Dist. of Philadelphia Bd. of Educ., 148 F.3d 260 (3d Cir. 1998) (court applied rational basis test to parents' challenge to school district's program for prevention of sexual disease raising parental rights in conjunction with other constitutional claims, although parents apparently did not raise, and Court did not address, "hybrid rights" theory).

This Court need not and does not decide whether the Court of Appeals for the Third Circuit would explicitly incorporate a "hybrid rights" exception into its Free Exercise Clause analysis. As the preceding discussion shows, even where "hybrid rights" is recognized as a viable theory, Plaintiffs herein do not qualify for its application, so the general rule announced in the Smith case would prevail. Therefore, measuring Plaintiffs' First Amendment Free Exercise challenge to Act 169 under the Smith rational basis test, Act 169 passes constitutional muster as a neutral law of general applicability and effect.

Even if this Court were to apply a "hybrid rights" heightened or strict scrutiny test, however, Plaintiffs' free exercise challenge to Act 169 on its face would still fail. Every court to have considered similar challenges by parents of home schoolers to compulsory attendance laws and various regulations by school boards and districts prior to 1990, under the pre-Smith strict scrutiny regime, concluded either that the parents had not demonstrated a substantial burden, or that the state had presented

compelling interests justifying such burden. See, e.g., New Life Baptist Academy v. Township of East Longmeadow, 885 F.2d 940 (1st Cir. 1989) (state's procedural requirements of religious schools designed to ensure adequate education is taking place does not violate Free Exercise or Establishment Clauses of First Amendment; collecting numerous pre-Smith cases and distinguishing Yoder; opinion by Breyer, J.); Mazanec v. North Judson-San Pierre Sch. Corp., 798 F.2d 230 (7th Cir. 1986); Murphy v. State of Arkansas, 852 F.2d 1039 (8th Cir. 1988) (applying strict scrutiny, Arkansas Home Schooling Act did not violate Free Exercise Clause of First Amendment; distinguishing Yoder); Blackwelder v. Safnauer, 689 F.Supp. 106 (N.D.N.Y. 1988) (applying strict scrutiny, New York's Home Schooling Act did not violate Free Exercise or Establishment Clauses of First Amendment or Due Process Clause of Fourteenth Amendment; collecting numerous cases and finding compelling state interests in such regulations); State of Ohio v. Schmidt, 505 N.E.2d 627 (Ohio 1987) (applying strict scrutiny, Ohio's Home Schooling Act did not violate Free Exercise Clause of First Amendment; collecting numerous cases and finding compelling state interests in such regulations); Care and Protection of Charles, 504 N.E.2d 592 (Mass. 1987) (applying strict scrutiny, Massachusett's Home Schooling Act did not violate Free Exercise Clause of First Amendment; collecting numerous cases and finding compelling state interests in such regulations).

States have employed a variety of techniques and procedural requirements of different intensity in

crafting home education programs that would permit home schoolers to satisfy compulsory education laws and ensure that the students were receiving adequate education. Where a court has reached the compelling state's interests and less restrictive means portions of the test, the burden on parental rights in this context routinely has been found to be justified, as the above cited cases amply illustrate.

3. Role of Judiciary

While it may be true, as Plaintiffs herein argue, that other states have no procedures concerning home schoolers or simpler and less time consuming procedures for home schooling parents and guardians to provide the necessary assurances of adequate education to the state, it is not the role of the judiciary to substitute its judgment, or the judgment of elected or non-elected officials of other states, for the wisdom of the elected legislative body who crafted the procedures for the Commonwealth of Pennsylvania. In fact, the Pennsylvania General Assembly has accommodated home schooling parents by statute, subject to statutory requirements, thus ensuring that home schooling would satisfy the Compulsory Attendance Law even over possible objections by local school board, school administrator or the PDE. Further, the Pennsylvania RFPA is always available to parents and guardians should any local school board, school administrator or the PDE attempt to regulate educational content, textbooks, curriculum and instructional materials on the basis of religious content, or otherwise attempt to apply or interpret

Act 169 in a manner that impacts the exercise, practice, conduct or expression of religion.

For all of the foregoing reasons, this Court will deny Plaintiffs' motion for summary judgment as to their facial challenge to Act 169 as a violation of their right to freely exercise their religion, but will leave open the possibility that they might be able to establish such a claim "as applied".

C. Remaining Constitutional Challenges

The Court will also deny summary judgment on Plaintiffs' remaining constitutional facial challenges to Act 169 — that it violates the Establishment Clause of the First Amendment; several aspects of the Due Process Clause of the Fourteenth Amendment; and the Free Speech Clause of the First Amendment (including their right to resist "compelled speech"). As Plaintiffs' brief in support of summary judgment manifests, these cases are principally about the RFPA and the Free Exercise Clause of the First Amendment. The cases discussed in the preceding section illustrate that each of Plaintiffs' additional constitutional claims are frequently joined with free exercise claims in the parental rights - compulsory education arena, and the analysis and resolution of the claims substantially overlap. Those additional challenges fare no better, in the parental rights - compulsory education arena, than the free exercise claims. Accordingly, the Court will not elaborate its rulings on these additional facial challenges, and will deny summary judgment on said challenges. However, as

stated above, Plaintiffs' "as applied" challenges will proceed through a second round of summary judgment motions and/or trial.

VI. Summary

Although parents and guardians have the primary and crucial role in the upbringing of and choice of education for their children, the state has a secondary, yet substantial, role to play, and has since the founding of our Nation. The Pennsylvania Constitution has provided for public education since 1776, and currently directs the General Assembly to "provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const., Art. III, § 14.

Implementing its constitutional mandate, the Pennsylvania General Assembly has created a system of public education and compulsory attendance, and has authorized four alternative means of satisfying the compulsory attendance law, including under Act 169, Pennsylvania's Home Schooling Act. Act 169 does not require or prohibit any particular content in textbooks, courses, curriculum or other educational materials, but merely requires instruction for a minimum amount of time and days, in certain specific courses deemed necessary by the legislature, with procedures for demonstrating compliance.

This Court does not function as a super school board, questioning the effectiveness of the procedures crafted by the duly elected

representatives of the citizens of Pennsylvania, nor may the Court substitute its opinion for the collective wisdom of the General Assembly as to what is "appropriate education" or what are the best procedures to achieve the constitutional mandate of providing a thorough and efficient system of public schools. Those decisions are within the legislative prerogative. This Court's role is, instead, the substantially more circumscribed one of measuring the decisions made by the legislature against the protections afforded by the Constitution of the United States and by governing statutes.

For the reasons set forth above, this Court finds that Act 169 does not, on its face, violate the Free Exercise, Establishment, or Free Speech Clauses of the First Amendment to the Constitution of the United States, the Due Process Clause of the Fourteenth Amendment, or the Pennsylvania Religious Freedom Protection Act.

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All Counsel of Record

United States Constitution, Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation

therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Purdon's Pennsylvania Statutes and Consolidated Statutes

Title 24 P.S. Education

Chapter 1. Public School Code of 1949

Article XIII. Pupils and Attendance

(B) Enforcing Attendance

→§ 13-1327. Compulsory school attendance

(a) Except as hereinafter provided, every child of compulsory school age having a legal residence in this Commonwealth, as provided in this article, and every migratory child of compulsory school age, is required to attend a day school in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language. In lieu of such school attendance, any child fifteen years of age with the approval of the district superintendent and the approval of the Secretary of Education, and any child sixteen years of age with the approval of the district superintendent of schools, may enroll as a day student in a private trade school or in a private business school licensed by the Department of Education, or in a trade or business school, or department operated by a local school district or districts. Such modified program offered in a public school must meet the standards prescribed by the State Board of Education or the State Board for Vocational Education. Except as hereinafter provided, every parent, guardian, or other person having control or charge of any child or children of compulsory school age is required to send such child or children to a day school in which the subjects and

activities prescribed by the standards of the State Board of Education are taught in the English language. Such parent, guardian, or other person having control or charge of any child or children, fifteen or sixteen years of age, in accordance with the provisions of this act, may send such child or children to a private trade school or private business school licensed by the Department of Education, or to a trade or business school, or department operated by a local school district or districts. Such modified program offered in a public school must meet the standards prescribed by the State Board of Education or the State Board for Vocational Education. Such child or children shall attend such school continuously through the entire term, during which the public schools in their respective districts shall be in session, or in cases of children of migrant laborers during the time the schools are in session in the districts in which such children are temporarily domiciled. The financial responsibility for the education of such children of migrant laborers shall remain with the school district in which such children of migrant laborers are temporarily domiciled; except in the case of special schools or classes conducted by an intermediate unit and approved by the Department of Education or conducted by the Department of Education. The certificate of any principal or teacher of a private school, or of any institution for the education of children, in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language, setting forth that the work of said school is in compliance with the provisions of this act, shall be sufficient and satisfactory evidence thereof. Regular

daily instruction in the English language, for the time herein required, by a properly qualified private tutor, shall be considered as complying with the provisions of this section. For the purposes of this section, "properly qualified private tutor" shall mean a person who is certified by the Commonwealth of Pennsylvania to teach in the public schools of Pennsylvania; who is teaching one or more children who are members of a single family; who provides the majority of the instruction to such child or children; and who is receiving a fee or other consideration for such instructional services. No person who would be disqualified from school employment by the provisions of subsection (e) of section 111 [FN1] may be a private tutor, as provided for in this section. The private tutor must file a copy of his Pennsylvania certification and the required criminal history record with the student's district of residence superintendent.

(b) A child enrolled in a day school which is operated by a bona fide church or other religious body, and the parent, guardian or other person having control or charge of any such child or children of compulsory school age shall be deemed to have met the requirements of this section if that school provides a minimum of one hundred eighty (180) days of instruction or nine hundred (900) hours of instruction per year at the elementary level or nine hundred ninety (990) hours per year of instruction at the secondary level and:

(1) At the elementary school level, the following courses are taught: English, to include spelling, reading and writing; arithmetic; science; geography;

history of the United States and Pennsylvania; civics; safety education, including regular and continuous instruction in the dangers and prevention of fires; health and physiology; physical education; music; and art.

(2) At the secondary school level, the following courses are offered: English, to include language, literature, speech and composition; science, to include biology and chemistry; geography; social studies, to include civics, economics, world history, history of the United States and Pennsylvania; a foreign language; mathematics, to include general mathematics and statistics, algebra and geometry; art; music; physical education; health and physiology; and safety education, including regular and continuous instruction in the dangers and prevention of fires.

The requirements contained in sections 1511 and 1605 of this act [FN2] shall not apply to such schools. The notarized affidavit of the principal of any such school, filed with the Department of Education and setting forth that such subjects are offered in the English language in such school, whether it is a nonprofit organization, and that such school is otherwise in compliance with the provisions of this act, shall be satisfactory and sufficient evidence thereof. It is the policy of the Commonwealth to preserve the primary right and the obligation of the parent or parents, or person or persons in loco parentis to a child, to choose the education and training for such child. Nothing contained in this act shall empower the Commonwealth, any of its officers, agencies or

subdivisions to approve the course content, faculty, staff or disciplinary requirements of any religious school referred to in this section without the consent of said school.

(c) A child enrolled in a day or boarding school accredited by an accrediting association which is approved by the State Board of Education, and the parent, guardian or other person having designated control or charge of any child or children of compulsory school age shall be deemed to have met the requirements of subsection (a).

(d) Instruction to children of compulsory school age provided in a home education program, as provided for in section 1327.1 [FN3] of this act, shall be considered as complying with the provisions of this section, except that any student who has been identified pursuant to the provisions of the Education of the Handicapped Act (Public Law 91-230, 20 U.S.C. § 1401 et seq.) as needing special education services, excluding those students identified as gifted and/or talented, shall be in compliance with the requirements of compulsory attendance by participating in a home education program, as defined in section 1327.1, when the program addresses the specific needs of the exceptional student and is approved by a teacher with a valid certificate from the Commonwealth to teach special education or a licensed clinical or certified school psychologist, and written notification of such approval is submitted with the notarized affidavit required under section 1327.1(b). The supervisor of a home education program may request that the school district or intermediate unit of

residence provide services that address the specific needs of the exceptional student in the home education program. When the provision of services is agreed to by both the supervisor and the school district or intermediate unit, all services shall be provided in the public schools or in a private school licensed to provide such programs and services.

CREDIT(S)

1949, March 10, P.L. 30, art. XIII, § 1327. Amended 1949, April 14, P.L. 454, § 1; 1951, Sept. 28, P.L. 1551, § 3; 1959, April 22, P.L. 50, § 1; 1961, July 25, P.L. 841, § 2; 1965, Oct. 21, P.L. 601, § 34; 1970, Jan. 14, P.L. (1969) 468, § 46, effective July 1, 1970; 1970, May 4, P.L. 326, No. 103, § 1; 1986, Dec. 15, P.L. 1602, No. 178, § 2, imd. effective; 1988, Dec. 21, P.L. 1321, No. 169, § 2, imd. effective.

[FN1] 24 P.S. § 1-111.

[FN2] 24 P.S. §§ 15-1511 and 16-1605.

[FN3] 24 P.S. § 13-1327.1.

Purdon's Pennsylvania Statutes and Consolidated Statutes

Title 24 P.S. Education

Chapter 1. Public School Code of 1949

Article XIII. Pupils and Attendance (B) Enforcing Attendance

→§ 13-1327.1. Home education program

(a) The following words and phrases when used in this section shall have the meanings given to them in this subsection:

"Appropriate education" shall mean a program consisting of instruction in the required subjects for the time required in this act and in which the student demonstrates sustained progress in the overall program.

"Hearing examiner" shall not be an officer, employe or agent of the Department of Education or of the school district or intermediate unit of residence of the child in the home education program.

"Home education program" shall mean a program conducted, in compliance with this section, by the parent or guardian or such person having legal custody of the child or children.

"Supervisor" shall mean the parent or guardian or such person having legal custody of the child or children who shall be responsible for the provision of instruction, provided that such person has a high school diploma or its equivalent.

(b) The requirements contained in sections 1511 and 1511.1, [FN1] except as provided for in this section, and section 1605 [FN2] shall not apply to home education programs. A home education program shall not be considered a nonpublic school under the provisions of this act.

(1) A notarized affidavit of the parent or guardian or other person having legal custody of the child or children, filed prior to the commencement of the home education program and annually thereafter on August 1 with the superintendent of the school district of residence and which sets forth: the name of the supervisor of the home education program who shall be responsible for the provision of instruction; the name and age of each child who shall participate in the home education program; the address and telephone number of the home education program site; that such subjects as required by law are offered in the English language, including an outline of proposed education objectives by subject area; evidence that the child has been immunized in accordance with the provisions of section 1303(a) [FN3] and has received the health and medical services required for students of the child's age or grade level in Article XIV; and that the home education program shall comply with the provisions of this section and that the notarized affidavit shall be satisfactory evidence thereof. The required outline of proposed education objectives shall not be utilized by the superintendent in determining if the home education program is out of compliance with this section and section 1327. [FN4] The affidavit shall contain a certification to be signed by the supervisor that the supervisor, all adults living in

the home and persons having legal custody of a child or children in a home education program have not been convicted of the criminal offenses enumerated in subsection (e) of section 111 [FN5] within five years immediately preceding the date of the affidavit.

(2) In the event the home education program site is relocating to another school district within this Commonwealth during the course of the public school term or prior to the opening of the public school term in the fall, the supervisor of the home education program must apply, by registered mail, thirty (30) days prior to the relocation, to the superintendent of the district in which he or she currently resides, requesting a letter of transfer for the home education program to the district to which the home education program is relocating. The current superintendent of residence must issue the letter of transfer thirty (30) days after receipt of the registered mail request of the home education program supervisor.

(i) If the home education program is not in compliance with the provisions of this section, the superintendent of the current district of residence must inform the home education supervisor and the superintendent of the district to which the home education program is relocating the status of the home education program and the reason for the denial of the letter of transfer.

(ii) If the home education program is in hearing procedures, as contained in this section, the superintendent of the current district of residence

must inform the home education supervisor, the assigned hearing examiner and the superintendent of the district to which the home education program is relocating the status of the home education program and the reason for the denial of the letter of transfer.

(3) The letter of transfer, required by clause (2), must be filed by the supervisor of the home education program with the superintendent of the new district of residence. In the case of pending proceedings, the new district of residence superintendent shall continue the home education program until the appeal process is finalized.

(c) A child who is enrolled in a home education program and whose education is therefore under the direct supervision of his parent, guardian or other person having legal custody shall be deemed to have met the requirements of section 1327 if that home education program provides a minimum of one hundred eighty (180) days of instruction or nine hundred (900) hours of instruction per year at the elementary level, or nine hundred ninety (990) hours per year at the secondary level:

(1) At the elementary school level, the following courses shall be taught: English, to include spelling, reading and writing; arithmetic; science; geography; history of the United States and Pennsylvania; civics; safety education, including regular and continuous instruction in the dangers and prevention of fires; health and physiology; physical education; music; and art.

(2) At the secondary school level, the following courses shall be taught: English, to include language, literature, speech and composition; science; geography; social studies, to include civics, world history, history of the United States and Pennsylvania; mathematics, to include general mathematics, algebra and geometry; art; music; physical education; health; and safety education, including regular and continuous instruction in the dangers and prevention of fires. Such courses of study may include, at the discretion of the supervisor of the home education program, economics; biology; chemistry; foreign languages; trigonometry; or other age-appropriate courses as contained in Chapter 5 (Curriculum Requirements) of the State Board of Education.

(d) The following minimum courses in grades nine through twelve are established as a requirement for graduation in a home education program:

(1) Four years of English.

(2) Three years of mathematics.

(3) Three years of science.

(4) Three years of social studies.

(5) Two years of arts and humanities.

(e) In order to demonstrate that appropriate education is occurring, the supervisor of the home education program shall provide and maintain on file the following documentation for each student enrolled in the home education program:

(1) A portfolio of records and materials. The portfolio shall consist of a log, made contemporaneously with the instruction, which designates by title the reading materials used, samples of any writings, worksheets, workbooks or creative materials used or developed by the student and in grades three, five and eight results of nationally normed standardized achievement tests in reading/language arts and mathematics or the results of Statewide tests administered in these grade levels. The department shall establish a list, with a minimum of five tests, of nationally normed standardized tests from which the supervisor of the home education program shall select a test to be administered if the supervisor does not choose the Statewide tests. At the discretion of the supervisor, the portfolio may include the results of nationally normed standardized achievement tests for other subject areas or grade levels. The supervisor shall ensure that the nationally normed standardized tests or the Statewide tests shall not be administered by the child's parent or guardian.

(i) A teacher or administrator who evaluates a portfolio at the elementary level (grades kindergarten through six) shall have at least two years of experience in grading any of the following subjects: English, to include spelling, reading and writing; arithmetic; science; geography; history of the United States and Pennsylvania; and civics.

(ii) A teacher or administrator who evaluates a portfolio at the secondary level (grades seven through twelve) shall have at least two years of experience in grading any of the following subjects: English, to include language, literature, speech, reading and composition; science, to include biology, chemistry and physics; geography; social studies, to include economics, civics, world history, history of the United States and Pennsylvania; foreign language; and mathematics, to include general mathematics, algebra, trigonometry, calculus and geometry.

(iii) As used in this clause, the term "grading" shall mean evaluation of classwork, homework, quizzes, classwork-based tests and prepared tests related to classwork subject matter.

(2) An annual written evaluation of the student's educational progress as determined by a licensed clinical or school psychologist or a teacher certified by the Commonwealth or by a nonpublic school teacher or administrator. Any such nonpublic teacher or administrator shall have at least two years of teaching experience in a Pennsylvania public or nonpublic school within the last ten years. Such nonpublic teacher or administrator shall have the required experience at the elementary level to evaluate elementary students or at the secondary level to evaluate secondary students. The certified teacher shall have experience at the elementary level to evaluate elementary students or at the secondary level to evaluate secondary students. The evaluation shall also be based on an interview of the child and a review of the portfolio required in clause

(1) and shall certify whether or not an appropriate education is occurring. At the request of the supervisor, persons with other qualifications may conduct the evaluation with the prior consent of the district of residence superintendent. In no event shall the evaluator be the supervisor or their spouse.

(f) The school district of residence shall, at the request of the supervisor, lend to the home education program copies of the school district's planned courses, textbooks and other curriculum materials appropriate to the student's age and grade level.

(f.1) (1) Beginning January 1, 2006, the school district of residence shall permit a child who is enrolled in a home education program to participate in any activity that is subject to the provisions of section 511,[FN6] including, but not limited to, clubs, musical ensembles, athletics and theatrical productions provided that the child:

(i) Meets the eligibility criteria or their equivalent for participation in the activity that apply to students enrolled in the school district;

(ii) Meets the tryout criteria or their equivalent for participation in the activity that apply to students enrolled in the school district; and

(iii) Complies with all policies, rules and regulations or their equivalent of the governing organization of the activity.

(2) For the purposes of this subsection, the school district of residence's program of interscholastic

athletics, including varsity sports, shall be considered an activity and shall include all activities related to competitive sports contests, games, events or exhibitions involving individual students or teams of students whenever such activities occur between schools within the school district or between schools outside of the school district.

(3) Where the activity requires completion of a physical examination or medical test as a condition of participation and the school district of residence offers such physical examination or medical test to students enrolled in the school district, the school district shall permit a child who is enrolled in a home education program to access such physical examination or medical test. The school district shall publish the dates and times of such physical examination or medical test in a publication of general circulation in the school district and on its publicly accessible Internet website.

(4) A board of school directors may adopt a policy to implement the requirements of this subsection. Such policy shall only apply to participation in activities and shall not conflict with any provisions of this section.

(g) When documentation is required by this section to be submitted to the district of residence superintendent or the hearing examiner, the superintendent or the hearing examiner shall return, upon completion of his review, all such documentation to the supervisor of the home education program. The superintendent or hearing

examiner may photocopy all or portions of the documentation for his files.

(h) Such documentation required by subsection (e)(1) and (2) shall be provided to the public school district of residence superintendent at the conclusion of each public school year. In addition, if the superintendent has a reasonable belief that, at any time during the school year, appropriate education may not be occurring in the home education program, he may, by certified mail, return receipt requested, require documentation pertaining to the portfolio of records and materials required by subsection (e)(1) to be submitted to the district within fifteen (15) days; and documentation pertaining to subsection (e)(2) to be submitted to the district within thirty (30) days. If the tests as required in subsection (e)(1) have not been administered at the time of the receipt of the certified letter by the supervisor, the supervisor shall submit the other required documentation and shall submit the test results with the documentation at the conclusion of the school year.

(i) If the superintendent of the public school district determines, based on the documentation provided, at the end of or during the school year, that appropriate education is not taking place for the child in the home education program, the superintendent shall send a letter by certified mail, return receipt requested, to the supervisor of the home education program stating that in his opinion appropriate education is not taking place for the child in the home education program and shall return all documentation, specifying what aspect or aspects of the documentation are inadequate.

(j) Upon receipt of the certified letter required by subsection (i), the supervisor of the home education program shall have twenty (20) days to submit additional documentation demonstrating that appropriate education is taking place for the child in the home education program. If documentation is not submitted within that time, the home education program for the child shall be out of compliance with the requirements of this section and section 1327, and the student shall be promptly enrolled in the public school district of residence or a nonpublic school or a licensed private academic school.

(k) If the superintendent determines that the additional documentation submitted still does not demonstrate that appropriate education is taking place in the home education program, he shall so notify the supervisor of the home education program by certified mail, return receipt requested, and the board of school directors shall provide for a proper hearing by a duly qualified and impartial hearing examiner within thirty (30) days. The examiner shall render a decision within fifteen (15) days of the hearing except that he may require the establishment of a remedial education plan mutually agreed to by the superintendent and supervisor of the home education program which shall continue the home education program. The decision of the examiner may be appealed by either the supervisor of the home education program or the superintendent to the Secretary of Education or Commonwealth Court.

(l) If the hearing examiner finds that the documentation does not indicate that appropriate

education is taking place in the home education program, the home education program for the child shall be out of compliance with the requirements of this section and section 1327, and the student shall be promptly enrolled in the public school district of residence or a nonpublic school or a licensed private academic school.

(m) At such time as the child's home education program has been determined to be out of compliance with the provisions of this section and section 1327, the supervisor or spouse of the supervisor of the home education program shall not be eligible to supervise a home education program for that child, as provided for in subsection (b)(1) of this section, for a period of twelve (12) months from the date of such determination.

CREDIT(S)

1949, March 10, P.L. 30, No. 14, art. XIII, § 1327.1, added 1988, Dec. 21, P.L. 1321, No. 169, § 3, imd. effective. Amended 2005, Nov. 10, P.L. 374, No. 67, § 1, imd. effective.

[FN1] 24 P.S. §§ 15-1511, 15-1511.1.

[FN2] 24 P.S. § 16-1605.

[FN3] 24 P.S. § 13-1303(a) (repealed); see now 24 P.S. § 13-1303a.

[FN4] 24 P.S. § 13-1327.

[FN5] 24 P.S. § 1-111(e).

[FN6] 24 P.S. § 5-511.